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No. 10-330

In The Supreme Court of the United States

ARNOLD SCHWARZENEGGER,
Governor of California; State of California,

Petitioners,

v.

RINCON BAND OF LUISENO MISSION INDIANS of the Rincon Reservation, aka RINCON SAN LUISENO BAND OF MISSION INDIANS, aka RINCON BAND OF LUISENO INDIANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act of 1988 ("IGRA") compels federally recognized Indian tribes to enter into compacts with states to set the terms by which tribes may conduct casino-style gaming on their Indian lands. IGRA's compact requirement did not abrogate Indian tribes' immunity to state taxation, and provides that a state's demand for direct taxation in compact negotiations is evidence of bad faith. This petition for a writ of certiorari presents the following questions:

1. Whether a state demands direct taxation of an Indian tribe in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it bargains for a share of tribal gaming revenue for the State's general fund.

2. Whether the court below exceeded its jurisdiction to determine the State's good faith in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it weighed the relative value of concessions offered by the parties in those negotiations.

PARTIES TO THE PROCEEDINGS

Petitioner Arnold Schwarzenegger is the Governor of the State of California; he was a defendant in the district court, and an appellant and cross-appellee in the court of appeals. He was sued in his official capacity. Petitioner State of California ("the State"), is a constituent State of the United States, a defendant in the district court, and an appellant and cross-appellee in the court of appeals. Respondent Rincon Band of Luiseno Mission Indians of the Rincon Reservation ("the Rincon Band") is an Indian entity located within the geographic boundaries of the State of California and is recognized and eligible to receive services from the United States Bureau of Indian Affairs, a plaintiff in the district court, and an appellee and cross-appellant in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, (App. 1-127) is reported at 602 F.3d 1019. The opinion of the district court (App. 128-172) is reported at 2008 WL 6136699. A prior opinion in this case (on rulings not sought to be reviewed by this petition for a writ of certiorari) is reported at 290 Fed. Appx. 60 (9th Cir. 2008), cert. den., 129 S.Ct. 1995 (2009).

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on April 20, 2010. The court of appeals denied a timely petition for rehearing *en banc* on June 7, 2010, App. 174, but stayed the issuance of its mandate to allow time to file this petition for a writ of certiorari. The jurisdiction of this court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8 of the United States Constitution provides:

> The Congress shall have power . . . [t]o regulate Commerce . . . with the Indian tribes;

Section 3 of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2702, provides:

> The purpose of this chapter is –
>
> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of Promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
>
> * * *

Section 11 of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710, provides:

> (d)(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –
>
> (A) authorized by an ordinance or resolution that –
>
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
>
> (ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * *

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations

described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

* * *

(7)(A) The United States district courts shall have jurisdiction over –

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

* * *

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to

conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court –

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable

Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State

governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates –

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

* * *

Article IV, section 19, of the California Constitution provides:

(a) The Legislature has no power to authorize lotteries, and shall prohibit the sale of lottery tickets in the State.

* * *

(e) The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey.

(f) Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

STATEMENT

1. In *California v. Cabazon Band of Mission Indians*, 480 U.S 202 (1987), this Court held that the State of California lacked authority to regulate high-stakes bingo operations on the Morongo and Cabazon Indian reservations. In response to the *Cabazon Band* decision, Congress enacted the Indian Gaming Regulatory Act of 1988 to create a statutory framework for the conduct of gaming on tribal lands that balances the sovereign interests the federal government, states, and tribes all have in tribal gaming. *Seminole*

Tribe of Florida v. Florida, 517 U.S. 44, 48 (1996). Under this framework, gaming activity is divided into three separate classes, over which the three governments have varying degrees of regulatory authority. States have a significant regulatory role only with regard to the most lucrative form of gaming, class III, which generally means blackjack, slot machines, and other banked and percentage games common in Nevada and Atlantic City at the time of IGRA's passage. § 2710(b)(7)(B).[1] IGRA authorizes Indian tribes to conduct class III gaming only in states that permit such gaming, and in "conformity with a tribal-state compact negotiated by the Indian tribe and the State under [§ 2710(d)(3) *et seq.*] that is in effect." § 2710(d)(1). According to the Senate Report accompanying the passage of IGRA,

> *both State and tribal governments have significant governmental interests in the conduct of class III gaming.* States and tribes are encouraged to conduct negotiations within the context of *the mutual benefits* that can flow to and from tribe [sic] and States. *This is a strong and serious presumption that must provide the framework for negotiations. . . .* A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the

[1] All statutory citations are to Title 25 of the United States Code, unless otherwise specified.

> State's regulatory system, *including its economic interest in raising revenue for its citizens.*

S. Rep. No. 100-446, at 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (emphasis added).

IGRA provides that a tribal-state gaming compact *may* include provisions relating to the following: (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations; (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity; (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities; (v) remedies for breach of contract; (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and (vii) *any other subjects that are directly related to the operation of gaming activities.* § 2710(d)(7)(C). Under IGRA, once a compact is negotiated, it must be approved by the Secretary of the Department of the Interior, prior to the compact going into effect; the Secretary may disapprove a compact only if the compact violates federal law or the trust obligations of the United States to Indians. § 2710(d)(8)(B).

States are required by IGRA to negotiate gaming compacts with tribes "in good faith," § 2710(d)(3)(A), and tribes may enforce this good faith obligation by filing suit in federal court. § 2710(d)(7)(A).[2] Since 2000, when class III gaming became lawful in California, sixty-seven tribes have negotiated compacts that have been approved by the Secretary of the Interior, and come into effect under the provisions of IGRA. Under the authority of a compact concluded in 1999, the Rincon Band operates the Harrah's Rincon Hotel and Casino, under a management contract with Harrah's Entertainment, Inc.

2. This case arises from the Rincon Band's request to negotiate an amendment to its existing tribal-state gaming compact with the State ("the 1999 Compact"). App. 7. Under the 1999 Compact, which expires in 2020, the Tribe is authorized to operate up to 2,000 slot machines at its tribal casino, and pays annually into the Revenue Sharing Trust Fund ("RSTF"), which supports other California tribes that either do not game, or operate small casinos. The

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[2] This Court has ruled that the Indian Commerce Clause does not grant Congress the power to abrogate the State's Eleventh Amendment Immunity to suit, and so § 2710(d)(7) cannot grant jurisdiction to the federal courts over a State that does not consent to be sued. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996). However, the State of California waived its Eleventh Amendment Immunity to this action under the terms of the 1999 Compact.

State derives no revenue sharing of any kind from the Rincon Band under the 1999 Compact.[3]

In these negotiations for an amendment, the Tribe sought to raise the cap on the number of slot machines allowed by the 1999 Compact, and to lengthen the compact's term. Negotiations for an amendment reached an impasse over the threshold question of whether, in exchange for an expansion of the Rincon Band's gaming rights, the State could lawfully bargain for a share of the Tribe's slot machine revenue to be contributed to the State's general fund. App. 8-12; see Cal. Govt. Code § 16300 (the State's general fund "consists of money received into the treasury and not required by law to be credited to any other fund").

The State had concluded that such negotiations for general fund revenue sharing would be lawful, and not otherwise violate public policy, because: (1) IGRA specifically authorizes negotiations over "subjects that are directly related to the operation of gaming activities," (§ 2710(d)(3)(C)(7)); (2) courts

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[3] The 1999 Compact between the Rincon Band and the State of California is one of sixty compacts approved by the Secretary in May 2000, all of which shared the same terms. *See* 65 Fed. Reg. 31189 (May 16, 2000) (approving the 1999 Compacts). The Rincon Band is not subject to revenue sharing under the Special Distribution Fund provisions of § 5 of the 1999 Compact, because it did not conduct gaming prior to 1999. The full compact can be accessed at the Internet site of the California Gambling Control Commission: http://www.cgcc.ca.gov/?pageID=compacts, last visited Aug. 19, 2010.

adjudicating a State's good faith may consider "the public interest, public safety, criminality, [a State's] financial integrity, and adverse economic impacts on existing gaming activities" (§ 2710(d)(7)(B)(iii)(I)); (3) the Ninth Circuit Court of Appeals had stated that "Congress . . . did not intend to require that States ignore their economic interests when engaged in compact negotiations" (see *In re Indian Gaming Related Cases* (*"Coyote Valley II"*), 331 F.3d 1094, 1115 (9th Cir. 2003)); and (4) ten compacts in California, memoranda of understanding in Massachusetts, and compacts in New York and Wisconsin already included general fund revenue sharing provisions approved by the Secretary of the Interior. App. 103-06.[4] The Tribe, in contrast, contended that any bargaining position seeking general-fund revenue sharing would constitute a demand for direct taxation in violation of IGRA. App. 142, 152-53.

Toward the end of negotiations, the State made two alternative offers to the Tribe. Its October 23, 2006, offer would have provided a five-year extension of the 1999 Compact's term, an additional layer of protection against an attack on exclusive tribal gaming rights which other California tribes had accepted, and the right to operate 900 additional slot machines. In exchange for the right to operate the 1,600 slot machines it already operated under the

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[4] Today, fifteen compacts in California include revenue sharing, as do compacts in Connecticut, Florida, Michigan, New York, New Mexico, Oklahoma, and Wisconsin. App. 103-05.

1999 Compact for an additional five years, the Rincon Band would provide ten percent of its net win on these devices to the State for general fund purposes. In exchange for the right to operate the additional 900 slot machines, the Rincon Band would provide fifteen percent of its net win on these devices to the State for general fund purposes. App. 7-12. Substantially similar terms had been accepted by other California tribes in renegotiations of their 1999 Compacts, and had been approved by the Department of the Interior in an exercise of its trust responsibility over Indian tribes. App. 123-24 (Bybee, J., dissenting).

At the Rincon Band's request, the State made an alternative offer on October 31, 2006. If accepted, this offer would have authorized the Tribe to operate 400 additional slot machines. In exchange the Rincon Band would have paid annually $2 million to the RSTF for small and non-gaming tribes, and twenty-five percent of the net win on the additional 400 slot machines to the State for general fund purposes. App. 11. Under either of these offers made by the State, the Rincon Band would remain the "primary beneficiary" of its tribal gaming operations, as is required by IGRA. § 2702(2).

Under the first of these offers, the Rincon Band's annual slot machine revenue would increase from $59 million to $61 million, App. 11-12; the State's annual revenue share with the Rincon Band would increase from $0 to $38 million; and Harrah's Entertainment, Inc. would receive an annual management fee of

$36.3 million.[5] Negotiations closed upon the Rincon Band's rejection of these offers. App. 12.

3. On June 9, 2004, the Rincon Band filed suit alleging the State's bargaining for general fund revenue sharing constituted bad faith negotiation, invoking the jurisdiction of the federal district court under 28 U.S.C. §§ 1331, 1343, 1367, 2201, and 2202, and 25 U.S.C § 2710(d)(7)(A). On April 29, 2008, the district court granted in part the Rincon Band's motion for summary judgment, and found the State to have engaged in bad faith negotiations in violation of IGRA. App. 130. The district court's analysis of the parties' cross-motions for summary judgment began with § 2710(d)(4). This provision bars the "imposition" of "any tax, fee, charge, or other assessment upon an Indian tribe" other than one agreed to under § 2710(d)(3)(C)(iii), which contemplates reimbursement to the State for its regulatory costs. App. 156. According to the district court, § 2710(d)(4) "does not categorically prohibit fee demands" and while a State lacks authority to "exact" revenue sharing payments, "it could bargain to receive them in exchange for a *quid pro quo* conferred in the compact." App. 157-62. Applying what the district court described as "basic

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[5] In *Coyote Valley II*, the Ninth Circuit approved revenue sharing to the State for allocation to the "Special Distribution Fund," which was established primarily to mitigate regulatory and other costs of Indian gaming. *Coyote Valley II*, 331 F.3d at 1114. The Rincon makes no payment to this fund, so to date the costs imposed upon the State by Harrah's Rincon Casino have not been mitigated.

contract principles" to the modification of the 1999 Compact, it concluded that the State's revenue sharing demands would constitute an "attempt to impose a tax" unless the State provided a "meaningful concession" to the Rincon Band in exchange. App. 162-62.

The district court concluded that because the State sought revenue for general purposes, rather than for the mitigation of gaming impacts, "the State's fee demands constitute an improper attempt to impose a tax on Rincon." App. 167. The district court next turned to the value of the consideration proposed by the State and concluded that "the payment of such a large fee to its general fund in return for concessions of markedly lesser value was in bad faith." App. 168. Pursuant to § 2710(d)(7)(B), the district court ordered the State and the Rincon Band to conclude an amended compact within sixty days, or submit to the arbitration process provided by the Act. App. 172. This order was stayed pending appeal to the Ninth Circuit Court of Appeals.

4. The Ninth Circuit Panel affirmed the district court in a two-to-one ruling. The majority first analogized the State's conduct of negotiations in this case to other official acts of depredation against Indian tribes, including the treaty violations imposed upon the Sioux Nation following the discovery of gold in the Black Hills. App. 14-15 (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)). Against this backdrop, the majority turned to IGRA's text, noting that IGRA required it to "consider any demand

by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." App. 16 (quoting § 2710(d)(7)(B)(iii)). The majority understood § 2710(d)(3)(C) as enumerating an exclusive list of permissible topics of compact negotiation, which list is circumscribed by § 2710(d)(4), providing that "nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe. . . ." App. 16-18. According to the majority, IGRA limits the permissible subjects of negotiation to "restrain aggression by powerful states," and prevents State interests from being served through compact negotiations. App. 15-20.

Turning to the negotiations between the Rincon Band and the State, the majority concluded that the State's negotiations for "a non-negotiable, mandatory payment of 10% of net profits into the State treasury for unrestricted use" constituted a demand for taxation, which it presumed to be evidence of bad faith. App. 21-22. The majority then concluded that this presumption of bad faith was not overcome because, in their view, the State failed to offer any "meaningful concession" of sufficient value in return for general fund revenue sharing. It is not at all clear, however, what the majority would consider a sufficiently "meaningful" concession, other than something that is "exceptionally valuable." App. 39. The majority was "unconvinced" an alternative remedy provision offered by the State would be "better" for the Tribe than

what it had; it considered that the financial benefit of one of the State's offers was "negligible" because "Rincon stood to gain only about $2 million in additional revenues;" and it concluded that the "relative value" of the State's demands and concessions "suggests the State was improperly using its authority." App. 43.

Finally, the majority rejected the State's argument that earlier approvals of general fund revenue sharing in compacts negotiated in California, and other states, and approved by the Secretary of the Interior, provided an objective, good faith basis for the State's bargaining position. "We . . . therefore hold that good faith should be evaluated objectively based on the record of negotiations, and that a state's subjective belief in the legality of its requests is not sufficient to rebut the inference of bad faith created by objectively improper demands." App. 48-53. The majority affirmed the district court order compelling further negotiations, followed by arbitration.

In a vigorous and lengthy dissent, Judge Bybee disputed the majority's conclusion that the State demanded direct taxation from the Rincon Band, or did anything other than engage in good faith negotiations: "[W]e have long held that the power to tax is defined by the sovereign's power to impose the tax. California has exercised no such power here. The majority has confused California's hardball negotiations with the taxing power." App. 54. Judge Bybee explained that, while the IGRA framework arose against an "intricate backdrop of federal-state-tribal

relations" under which Indian tribes are exempt from direct state taxation, App. 59-60 (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 183 n. 14 (1989)), it also reflects "cooperative federalism" under which Congress "'balance[d] the competing sovereign interests of the federal government, state governments and Indian tribes, by giving each a role in the regulatory scheme.'" App. 62 (quoting *Coyote Valley II*, 331 F.3d at 1096 and *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002)). The mechanism Congress developed to advance the "important – and potentially divergent – interests" of the sovereign states and sovereign tribes, was "as old as the free market itself: allow states and tribes to bargain over the terms of their class III gaming relationship." App. 63.

The dissent noted that IGRA's Senate Report encourages states and tribes "to conduct negotiations within the context of the mutual benefits that can flow to and from tribe [sic] and States," App. 63-64 (quoting S. Rep. No. 100-446, at 13 (1988)). However, to ensure that "IGRA's compact requirement did not '[lift] the Indians' exemption from state taxes,'" App. 65-66 (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. at 215 n. 17), Congress did two things: (1) in § 2710(d)(4), Congress explained that IGRA's compact requirement did not abrogate tribal immunity to taxation by stating that "[e]xcept for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section

shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in a class III activity," App. 66; and (2) in § 2710(d)(7)(B)(iii)(II), Congress declared that if a state demanded that a tribe abrogate its immunity to direct taxation as a condition of compact negotiations, the demand would be evidence of bad faith. App. 66-67. Viewed in this context, the dissent concluded that §§ 2710(d)(4) and (d)(7)(B)(iii)(II) were not intended to prevent negotiations over revenue sharing, but to prevent states using the "promise of class III gaming to otherwise impose taxes on Indian tribes and their land." App. 67-68.

Turning to the facts of this case, the dissent concluded that the State never sought to tax the Rincon Band because a tax, in contrast to negotiated revenue sharing, "is imposed by the state and may be collected by the state, under penalty of law, over the objections of its citizens." App. 76. Here, because California and the Rincon Band are independent sovereigns, "they may negotiate an agreement or not, but neither has the power to tax the other," a fact that is underscored by the fact that "[f]or all of its posturing and demands, California has, to date, not one penny to show for its negotiations with the [Rincon] Band." App. 77. Accordingly. the dissent concluded that California's bargaining may constitute a "hard line stance," but not a tax. App. 77. Finally,

the dissent's conception of what constitutes a "meaningful concession" sufficient to overcome a presumption of bad faith negotiation fundamentally differs the majority's. The dissent contends that a "meaningful concession" is essentially the same as "consideration" under the common law of contracts. Under this view, the court should not apply its own subjective assessment of the value of the parties' respective concessions because a "meaningful concession" is made whenever "a bundle of rights more valuable than the *status quo*" is offered. App. 91.

REASONS FOR GRANTING THE PETITION

A. The decision below presents urgent, important and recurring issues concerning the permissible scope of tribal-state negotiations under IGRA, and the authority of the Executive and Judicial Branches to intercede in tribal-state compact negotiations

1. Whether negotiations for general fund revenue sharing constitute a demand for direct taxation is an important and recurring issue demanding immediate resolution

The majority has thrown the law of tribal-state compact negotiations into disarray by holding that negotiation for general fund revenue sharing constitutes a demand for direct taxation in violation of IGRA. This conclusion is irreconcilable with the

numerous existing tribal-state relationships where general fund revenue sharing is an element of a settled gaming compact. In the dissent's words, the majority "does not just upset the apple cart – it derails the whole train." App. 56.

The majority's bad faith holding is not only remarkable for its sweeping impact on California's ability to negotiate with Indian tribes, but it will also have dramatic practical implications around the Nation. There are 562 recognized Indian tribes in the United States and gaming is currently conducted in 28 states.[6] General fund revenue sharing provisions are found in the fifteen compacts California has negotiated or renegotiated with tribes over the last six years, and in tribal-state compacts negotiated in Connecticut, Florida, Michigan, New York, New Mexico, Oklahoma, and Wisconsin. App. 103-106 (Bybee, J., dissenting). In every instance, these compacts have been approved by the Secretary of the Interior, in an exercise of the federal government's trust responsibility over Indian tribes. § 2710(d)(8)(B).

Indian gaming is an expanding industry, and at any given time states and tribes are engaged in expensive and time-consuming compact negotiations that may take months or years to conclude. These

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[6] General information related to Indian gaming is available at the National Indian Gaming Commission's Internet site. See http://www.nigc.gov/About_Us/Frequently_Asked_Questions.aspx, last visited Aug. 26, 2010.

negotiations are typically extraordinarily delicate and, when concluded, reflect a political accommodation between the sovereigns that is not entered into lightly. A compact must be entered in accordance with the law of each sovereign. See *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997) (Interior Secretary may not approve a tribal-state gaming compact entered into by state governor in violation of state law). In California, negotiations are conducted by the Governor, and any resultant compact must be ratified by the California Legislature. Cal. Const., Art. IV, § 19, subd. (f). Tribes also enter into compacts through a formal act of tribal government, § 2710(d)(1)(A), and significant tribal government resources are expended to engage the State in negotiations.

If the majority decision is allowed to stand, it will create an incentive for revenue sharing tribes to avoid paying millions, tens-of-millions, or even hundreds-of-millions of dollars in revenue-sharing to their respective states, by seeking to void or renegotiate their compacts. Indeed, the dissent recognizes the likely impact of the majority decision, and describes the result as "chaos as tribe after tribe seeks to reopen negotiations concluded and duly approved." App. 56. It may take years of further litigation in the federal courts to unwind disputes that are the fruit of the decision below. And for tribes without compacts, this decision will likely frustrate efforts to develop significant gaming operations because states, once

denied any meaningful benefit from tribal gaming, will have a powerful incentive to limit it.

The Court should grant review to consider the questions presented here because the decision below raises important and recurring issues demanding immediate resolution in order to preserve existing tribal-state compact relations, preserve the ability to conduct meaningful negotiations under IGRA, and to prevent enormous resources from being expended in litigation over the status of the existing general fund revenue sharing compacts that have been concluded in eight different states.

2. Whether federal courts have jurisdiction to weigh the value of concessions offered by the parties in tribal-state compact negotiations is an important and recurring issue demanding immediate resolution

The majority's analysis exceeded a legitimate inquiry into the State's good faith and went beyond the jurisdiction of the federal courts established by Congress in IGRA, and usurped authority more appropriately exercised by the Executive Branch. IGRA authorizes courts to determine only whether a state "has failed to negotiate in good faith. . . ." § 2710(d)(7)(B)(iii). When a court looks beyond the question of a state's good faith, and weighs the relative value of concessions offered by the parties, it assumes a policy making role Congress never envisioned. It is not for the federal courts to develop federal Indian policy on a circuit-by-circuit basis.

IGRA does not define "good faith," but the Ninth Circuit has recognized that it is appropriate to look at the closest analog to IGRA's good faith requirement, the National Labor Relations Act ("NLRA"), for guidance in interpreting the standard. *Coyote Valley II*, 331 F.3d at 1094. Under the NLRA there is an obligation to bargain collectively, defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in *good faith* with respect to wages, hours, and other terms and conditions of employment. . . ." 29 U.S.C. § 158(d). Under cases interpreting the NLRA, the duty of good faith bargaining does not require the parties to make particular concessions, or even to reach agreement. See *Livadas v. Bradshaw*, 512 U.S. 107, 117 n. 11 (1994) (Under the NLRA the obligation to bargain in good faith does not compel either party to agree to a proposal or require the making of a concession.) (citing 29 U.S.C. 158(d)).[7] It does envision, however,

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[7] Similarly, IGRA's Senate Report indicates that the compact negotiation process was not intended to guarantee the successful conclusion of negotiations:

> Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated.

S. Rep. No. 100-446, at 14 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3084.

"a sincere, serious effort to adjust differences and to reach an acceptable common ground." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981). An employer engages in bad faith or surface bargaining when it conducts negotiations "as a kind of charade or sham, all the while intending to avoid reaching an agreement. . . ." *Continental Ins. Co. v. NLRB*, 495 F.2d 44, 48 (2nd Cir. 1974).

In this case, the majority did not attempt to determine whether the State's conduct of negotiations was a sincere effort to reach agreement or was a charade, or sham. Instead, after erroneously concluding that the State had demanded direct taxation of the Tribe, the majority looked to the relative value of the concessions the State offered in exchange for general fund revenue sharing. But this inquiry has little relevance to whether the State engaged in a sincere effort to reach agreement. Indeed, nowhere does IGRA's text or legislative history suggest that federal courts were expected to weigh the value of concessions negotiated in the course of tribal-state compact negotiations. To the contrary, this valuation is, in the first instance, left expressly "between [the] two equal sovereigns." § 2710(d)(1)(C); S. Rep. No. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083. This is appropriate, because the concessions made in tribal-state compact negotiations, in the furtherance of the sovereigns' governmental interests, are essentially political in nature.

The majority's intrusion into these negotiations not only impinged upon the sovereignty of the Rincon

Band and the State, but also invaded the province of the Secretary of the Department of Interior, which is responsible for implementing federal Indian policy. IGRA provides that a tribal-state compact may go into effect only following approval by the Secretary. The Secretary may disapprove a compact if it violates federal law, or "the trust obligations of the United States to Indians." § 2710(d)(8)(B). If there is authority in IGRA to intrude upon the political process of compact negotiations, it resides in the Secretary's authority to disapprove a compact for a violation of the federal trust obligation. Moreover, where the Secretary disapproves a compact in an exercise of the federal government's trust obligations, the remedy under IGRA is a *bilateral* determination by the parties to return to compact negotiations. IGRA does not provide an express judicial remedy. Accordingly, under IGRA, any federal intrusion into the compact relationship is very narrow. The federal government has no seat at the table.

Accordingly, the majority decision violates the principle that federal courts, do not engage political questions, a doctrine that arises from the separation of powers and from prudential concerns regarding the respect courts owe the political departments, and restrains courts "from inappropriate interference in the business of the other branches of Government." See *Nixon v. U.S.*, 506 U.S. 224, 252-53 (1993) (Souter, J., concurring) (quoting *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990), and citing *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J.,

concurring in judgment). Construing IGRA to prohibit federal courts from weighing the value of concessions offered in negotiations would protect courts from incursion into political processes and avoid any resultant separation of powers concern.

The majority's misinterpretation of IGRA already caused mischief in the real world. On August 17, 2010, the United States Department of the Interior disapproved a compact, pursuant to § 2710(d)(8), that had been negotiated between the State of California and the Habemotolel Pomo of the Upper Lake ("Upper Lake Compact") and submitted for Secretarial approval on July 6, 2010. App. 175. Relying on the decision below, the Interior Department concluded that the fifteen percent general fund revenue sharing agreed to by the Tribe, is a tax. App 178-179. It then acknowledged that the exclusive gaming rights provided to Indian tribes under California law, and the cap of 700 slot machines authorized in the Upper Lake compact, were both "meaningful concessions" granted by the State. App. 182-183. Nevertheless, the Interior Department arrived at the inexplicable conclusion that these "meaningful concessions" did not "confer a *substantial* economic benefit on the Tribe *proportional* to the value received by the State." App. 183, 186 (emphasis added). While this decision appears to be an exercise of the Secretary's trust responsibility under § 2710(d)(8), the timing of this decision, its reasoning, and its incompatibility with earlier compact approvals, demonstrate that the majority's erroneous construction of IGRA has led the

Secretary to reach a baseless and far-reaching precedent, and stray from the deference that is due these dual-sovereign negotiations.

Notwithstanding the Secretary's disapproval of the Upper Lake compact, on the same day it was submitted for approval, the Secretary published notice of *approval* of another gaming compact between the Seminole Tribe of Florida and the State of Florida. See Notice of Approved Tribal-State Class III Gaming Compact, 75 Fed. Reg. 38833-02 (Jul. 6, 2010). Significantly, this twenty-year compact provides for general fund revenue sharing under which Florida anticipates receiving at least $1.2 billion from the Tribe for the Florida's public schools. See *Seminole Tribe celebrates new gaming compact with Florida*, Broward News and Entertainment Daily (May 6, 2010) (available at http://browardnetonline.com/2010/05/seminole-tribe-celebrates-new-gaming-compact-with-florida, last viewed Sept. 1, 2010).[8] It is not apparent from the Secretary's notice of approval, or from a review of the two compacts, what meaningful basis there is for the Secretary to approve the Seminole compact on the one hand, but disapprove the Upper Lake compact on the other – in both cases the Tribes have accepted compacts under which they will operate class III gaming free of non-Indian competition. Together, these decisions demonstrate

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[8] The Seminole compact is available on Governor of Florida's Internet site at the URL, http://www.flgov.com/pdfs/20100824_seminole.pdf, last viewed Sept. 1, 2010.

that as a result of the majority decision, IGRA is no longer being applied uniformly across the nation.

The majority's assumption of responsibility for valuing the parties' proposed concessions offends the dual-sovereign nature of tribal-state compact negotiations under IGRA, and asserts authority more properly exercised by the Secretary. The federal courts are not in a position to know intimately the unique nature of a tribal-state relationship, the course of negotiations, local economic conditions and myriad other factors that may inform the value of concessions. The Secretary, in its role as trustee over Indian tribes, is in a more appropriate position to make such valuations, and to do so in furtherance of federal Indian policy. The decision below has misconstrued the respective roles of the Judicial and Executive Branches in the tribal-state compact process under IGRA. This is an important federal question that implicates important rights and obligations of all three sovereigns, and deserves urgent attention from this Court.

B. The court of appeals finding of bad faith was erroneous, and prudential considerations weigh heavily in favor of granting the petition

As the dissent ably points out, the majority's errors are many, with consequences for states that are difficult to exaggerate. Literally hundreds of

millions of dollars in general fund revenues are at stake, as are stable political relations between dozens of states and the tribes located within their boundaries.

1. Negotiations for revenue sharing do not constitute a demand for direct taxation

IGRA provides that its compacting provisions shall not be interpreted as "conferring upon a State . . . authority to *impose* any tax, fee, charge, or other assessment upon an Indian tribe," and that this lack of authority is not a basis for a State's refusal to enter negotiations. § 2710(d)(4) (emphasis added). Without any consideration of what it would mean for the State to "impose" taxation on a sovereign tribe,[9] the majority concluded that the State's bargaining for revenue sharing violated § 2710(d)(4): "No amount of semantic sophistry can undermine the obvious: a non-negotiable, mandatory payment of 10% of net profits into the State treasury for unrestricted use yields public revenue, and is a 'tax.'" App. 21-22. However, taxation involves three elements: (1) a monetary contribution; (2) imposed by the government; (3) to yield public revenue. Black's Law Dictionary 1594 (9th ed. 2009). The majority ignored the second, most essential, element; it "simply sidesteps the 'imposition'

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[9] Indeed, at oral argument the author of the majority opinion characterized as "ludicrous" and "ridiculous" the State's contention that tribes exercise sovereign powers in compact negotiations under IGRA.

requirement by slapping the conclusory labels 'non-negotiable' and 'mandatory' on proposed revenue sharing payments that are neither." App. 77. (Bybee, J., dissenting).

Revenue sharing was certainly contemplated by Congress which recognized that "[a] state's governmental interests with respect to class III gaming on Indian lands include . . . impacts on the State's regulatory system, *including its economic interest in raising revenue for its citizens,*" and encouraged States and tribes "to conduct negotiations *within the context of the mutual benefits that can flow to and from tribe* [sic] and states." S. Rep. No. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (emphasis added). More importantly, Congress expressly authorized revenue sharing tied to income from the operation of slot machines, because such revenue is directly related to the operation of gaming. § 2710(d)(3)(C)(vii).

In *Coyote Valley II*, the Ninth Circuit recognized that state authority to negotiate for revenue sharing was expressly provided for in IGRA, provided the revenue stream was "directly related" to the Tribe's class III gaming operations. *Coyote Valley II*, 331 F.3d at 1111 (citing § 2710(d)(3)(C)(vii)). Here, as in *Coyote Valley II*, the State sought revenue sharing derived from, and so directly related to, the operation of the Tribe's class III slot machines. Notwithstanding this clear authority, the majority ruled that the notion the proposed revenue sharing was directly related to the Tribe's gaming operations was "circular," and rejected

it.[10] App. 29. The majority simply erred in ruling that the State sought to "impose" anything; it merely engaged in good faith negotiations, as IGRA requires it to do.

2. The majority's analysis of what constitutes a "meaningful concession" sufficient to justify a demand for direct taxation violates contract law, and usurps the role of the Secretary

Having concluded that the State demanded direct taxation in negotiations with the Rincon Band, the majority applied § 2710(d)(7)(B)(iii)(II) to establish a presumption that the State had negotiated in bad faith. The majority then applied its own subjective valuation of the concessions offered in negotiations to conclude that the State had failed to offer meaningful concessions sufficient to rebut this presumption of bad faith negotiation. This analysis was erroneous in both its approach and its application.

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[10] To support its construction of § 2710(d)(3)(C)(vii), the majority relied upon the "Indian canon" of statutory construction, which canon requires courts to construe *ambiguous* statutes in the manner most favorable to tribal interests. App. 18-19 n. 9; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). However, in *Coyote Valley II*, the Ninth Circuit ruled that § 2710(d)(3)(C)(vii) is "unambiguous." *Coyote Valley II*, 331, F.3d at 1111. Again, the majority erred. App. 100 n. 9.

Earlier Ninth Circuit decisions demonstrate an understanding that the federal court's jurisdiction to determine a State's good faith is much narrower than the majority has conceived it. *Coyote Valley II* and *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006), both stand for the proposition that a State does not exercise authority to "impose" a tax on a tribe when it engages in negotiations for revenue sharing and offers in exchange a meaningful concession. *Coyote Valley II* concerned a challenge to revenue sharing and other provisions proposed in the 1999 negotiations between California and the Coyote Valley Band of Pomo Indians. In *Coyote Valley II*, the revenue sharing provisions were either to fund tribes with small or no casinos for *general* tribal *uses*, or to fund the State's efforts to mitigate the impacts of, and regulate, tribal gaming. *Coyote Valley II*, 331 F.3d at 1105-06. The Ninth Circuit did not consider whether the revenue sharing sought in those negotiations constituted a direct tax, because "[w]here, as here, . . . a State offers meaningful concessions in return for fee demands, it does not exercise 'authority to impose' anything. Instead, it exercises its authority to negotiate, which IGRA clearly permits." *Coyote Valley II*, 331 F.3d at 1112. Significantly, the *Coyote Valley II* court defined a "meaningful concession" as something merely "real," a conception that comports which the application of the common-law doctrine of consideration. *Id.* See also *Shoshone-Bannock Tribes*, 465 F.3d at 1101 (indicating that while a "state [does] not have authority to exact [revenue sharing] payments, it [may] bargain to receive them in exchange for a *quid*

pro quo conferred in the compact"). These cases indicate that a meaningful concession is nothing more than "consideration" within the meaning of common law contract law.[11] Under the common law, however, courts do not weigh the adequacy of consideration, but will only determine whether putative consideration is nominal or a "sham." App. 92-93 (Bybee, J., citing 4 Joseph M. Perillo, et al., Corbin on Contracts §§ 5.14, 5.17 (2d ed. 1995)). It is for the good reason that the valuation of consideration is left to private action because the parties are "better able than others to evaluate the circumstances of particular transactions. . . ." Restatement (Second) of Contracts § 79 (1981).

The majority departs from *Coyote Valley II*'s sensible construction of IGRA, and denies that the State offers a meaningful concession when it "offers a bundle of rights more valuable than the status quo," as the State certainly did in this case. App 47-48. The dissent appropriately concluded that "[t]he majority's novel conception of 'meaningful concessions' finds no support in IGRA and conflicts with our explanation of 'meaningful concessions' in *Coyote Valley II*, the Department of the Interior's reading of the Act,

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[11] It is undisputed that the common law of contracts applies to the construction and interpretation of tribal-state gaming compacts. See § 2710(d)(3)(C) (noting that compacts may include "remedies for breach of contract"); see also *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997) (stating that a tribal-state compact "is a form of contract" and citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)).

and centuries of contracts jurisprudence as well." App. 91.

The majority also erred in the application of its own conception of what constitutes a meaningful concession, by concluding that neither of the State's two separate compact offers in October 2006, would provide a meaningful concession in exchange for general fund revenue sharing. Even in the majority's cramped view of the State's offers, the State offered a bundle of rights significantly more valuable than the *status quo*. The State's concessions included a five-year extension of the compact's term, an additional layer of protection for tribal gaming exclusivity, and an increase in the number of slot machines the Tribe could offer. These amounted to substantially more than mere consideration necessary for compact formation, and should have satisfied even the majority's conception of a "meaningful concession."

Although the decision below is the first federal court of appeals to consider whether general fund revenue sharing constitutes an impermissible tax under IGRA, it would be a mistake for this Court to await a split between circuit court decisions before considering the questions presented by this petition. The majority decision departs from prior decisions of the Ninth Circuit Court of Appeals, and threatens chaos in tribal-state gaming relations. If the decision below is not reversed, litigation will likely be filed in the Second, Sixth, Tenth, and Eleventh Circuits to "unsettle dozens of mutually beneficial revenue sharing provisions that have fed both tribal coffers

and revenue-hungry state treasuries." App. 127 (Bybee, J., dissenting). Multiple litigation of these questions would consume vast federal, state, and tribal resources, and unnecessarily extend the period of uncertainty in tribal-state gaming relations the decision below has guaranteed. And this uncertainty may not ultimately be resolved in favor of tribal gaming interests.

Notwithstanding the serious implications of the majority's decision, whether general fund revenue sharing constitutes direct taxation under IGRA is a relatively straightforward question of statutory construction that has been amply explored in the lengthy majority and dissenting opinions below. Accordingly, there is no reason for this Court to delay consideration of the important and urgent questions presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, AKA Rincon San Luiseno Band of Mission Indians, AKA Rincon Band of Luiseno Indians, *Plaintiff-Appellee,* v. ARNOLD SCHWARZENEGGER, Governor of California; STATE OF CALIFORNIA, *Defendants-Appellants.*	No. 08-55809 D.C. No. 3:04-cv-01151-WMC
RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, AKA Rincon San Luiseno Band of Mission Indians, AKA Rincon Band of Luiseno Indians, *Plaintiff-Appellee-Cross-Appellant,* v. ARNOLD SCHWARZENEGGER, Governor of California; STATE OF CALIFORNIA, *Defendants-Appellants-Cross-Appellees.*	No. 08-55914 D.C. No. 3:04-cv-01151-WMC OPINION

Appeal from the United States District Court
for the Southern District of California
William McCurine, Magistrate Judge, Presiding

Argued and Submitted
November 4, 2009 – Pasadena, California

Filed April 20, 2010

Before: Thomas G. Nelson, Jay S. Bybee and
Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.;
Dissent by Judge Bybee

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OPINION

MILAN D. SMITH, JR., Circuit Judge:

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, provides that a state must

negotiate in good faith with its resident Native American tribes to reach compacts concerning casino-style gaming on Native American lands. Defendants-Appellants/Cross-Appellees the State of California (the State) and Governor Arnold Schwarzenegger (Governor Schwarzenegger) (collectively as parties to this litigation, the State) appeal the district court's finding that, in violation of IGRA, 25 U.S.C. § 2710(d)(3)(A), the State negotiated in bad faith with Plaintiff-Appellee/Cross-Appellant the Rincon Band of Luiseno Mission Indians (Rincon) concerning amendments to the parties' existing tribal-state gaming compact.

The district court based its bad faith finding on the State's repeated insistence that Rincon pay a portion of its net revenues into the State's general fund, which the district court determined to be an attempt by the State to impose a tax on the tribe in violation of 25 U.S.C. § 2710(d)(4).

The State challenges the district court's characterization of its requests as an attempt to impose a tax, and argues that even if it was attempting to impose a tax, that alone is insufficient to support the finding of bad faith. We affirm.[1]

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[1] Because we affirm the district court's finding of bad faith on the issue of the State's demands for revenue sharing, we do not reach any of the alternative grounds for a finding of bad faith asserted by Rincon on cross-appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The 1999 Compacts

In the fall of 1999, the State (through then-governor Gray Davis) and Rincon negotiated a compact granting Rincon the right to operate casino-style (class III[2]) gaming on its lands located near San Diego, California, subject to certain limitations.[3] Simultaneously, the State's negotiations also resulted in similar compacts with dozens of other tribes across California. Although some of the 1999 compacts have since been renegotiated, the 1999 compact between Rincon and the State remains operative.

While negotiations over the 1999 compacts were pending, the California Supreme Court handed down its decision in *Hotel Employees & Restaurant Employees International Union v. Davis*, 981 P.2d 990 (Cal. 1999). In that case, the California Supreme Court determined that the California constitution prohibited everyone in the state, including Indian tribes, from operating Las Vegas-style casinos. As a

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[2] IGRA divides gaming into three classes. Class I involves traditional tribal gaming; class II involves bingo and non-banked card games; class III involves gambling not covered in class I or class II (such as casino-style gaming, including slot machines and banked card games). 25 U.S.C. § 2703.

[3] The compact included several terms that are irrelevant to the issues addressed in this opinion. For context, however, we note that under the 1999 compact, Rincon was permitted to operate a certain number of devices, plus draw additional device licenses from a limited statewide pool. The 1999 compact thus reflected a system of limited gaming.

major consideration, and in order to make the proposed 1999 compacts legally enforceable, the State sponsored a constitutional amendment – Proposition 1A – that would authorize tribal gaming in California.[4]

In March 2000, California voters approved Proposition 1A, thereby vivifying the 1999 compacts. Not only did Proposition 1A permit tribes to conduct class III gaming lawfully, it effectively gave tribes a state constitutional monopoly over casino gaming in California. *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1103 (9th Cir. 2003) (*Coyote Valley II*).

Revenue Sharing Under the 1999 Compacts

In consideration for the State's efforts in securing the passage of Proposition 1A (without which the tribes would have been barred from conducting class III gaming in the State of California), the tribes agreed to share a portion of their expected revenues. *Flynt v. Cal. Gambling Control Comm'n,* 129 Cal. Rptr. 2d 167, 175-77 (Ct. App. 2002). The State originally took the position that the revenue should be for general use, but abandoned that position during the negotiations in favor of tribal proposals.

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[4] For a more detailed history of Proposition 1A and related state/tribe negotiations concerning the 1999 compacts, *see In re Indian Gaming Related Cases,* 331 F.3d 1094 (9th Cir. 2003) and *Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712 (9th Cir. 2003).

See Coyote Valley II, 331 F.3d at 1102-03, 1113. The tribes agreed to pay a portion of their revenues into two funds: the Revenue Sharing Trust Fund (RSTF) and the Special Distribution Fund (SDF). *See id.* at 1104-05. Monies paid into the RSTF are redistributed to tribes who choose not to, or are unable to, conduct their own gaming activities. *Id.* at 1105. Monies paid into the SDF, on the other hand, are used to fund:

> (a) grants for programs designed to address gambling addiction; (b) grants for the support of state and local government agencies impacted by tribal gaming; (c) compensation for regulatory costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the compact; (d) payment of shortfalls that may occur in the RSTF; and (e) "any other purposes specified by the legislature."[5]

Id. at 1106.

In *Coyote Valley II,* appellants questioned whether the RSTF and SDF provisions of the 1999 compacts were lawful since IGRA, 25 U.S.C. § 2710(d)(4),

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[5] In this opinion, we focus only on subsections (a), (b) and (e) of the SDF. Subsection (c) is expressly authorized by § 2710(d)(3)(C)(iii), and the State does not rely upon it in its quest because it seeks to deposit funds into its general fund, not one with earmarked uses. Subsection (d) is effectively part of the RSTF so it need not be analyzed separately. We have previously construed subsection (e) to cover only those purposes *directly* related to gaming. *Coyote Valley II,* 331 F.3d at 1113-14.

precludes states from imposing taxes on Indian gaming. 331 F.3d 1094. We held that the RSTF and SDF were permissible notwithstanding § 2710(d)(4) because, as more fully explained *infra*, the nature of the revenue sharing and the constitutional exclusivity obtained in consideration for it were primarily motivated by a desire to promote *tribal* interests. *Id.* at 1110-15. We further concluded that by virtue of the 1999 compacts and Proposition 1A, the State gave all tribes in California significant opportunities to benefit from gaming without taking anything significant for itself, beyond what was required to protect its citizens from the adverse consequences of gaming, and to fulfill other regulatory and police functions contemplated by IGRA. *Id.*

The 2003-2006 Compact Renegotiations

Operating under its 1999 compact, Rincon began to generate significant revenue that enabled it to improve tribal governmental functions and become economically self-sufficient. By 2003, Rincon desired to expand its operations beyond what the 1999 compact permitted. Accordingly, in March of that year, Rincon notified the State of its interest in renegotiating certain provisions of the 1999 compact.

Negotiations began in 2003 in response to Rincon's request, but in October of that year, California voters recalled Governor Davis and elected Governor Schwarzenegger in his stead. Although negotiations eventually reconvened, they quickly assumed a

decidedly different tone. Instead of requesting funds to help defray the costs of gaming, or to benefit Indian tribes, the State demanded that Rincon pay a significant portion of its gaming revenues into the State's general fund.

The State made its first offer to Rincon on November 10, 2005.[6] The State offered Rincon the opportunity to operate 900 additional devices plus the 1600 devices Rincon already operated, but only if Rincon would agree to pay the State 15% of the net win on the new devices, along with an additional 15% annual fee based on Rincon's total 2004 net revenue. In exchange for the 15% revenue share demanded, the State offered Rincon an "exclusivity provision."[7]

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[6] In June 2004, Rincon filed the present suit in order to force the State to expedite negotiations. The offers described herein were both IGRA negotiations and on-the-record settlement negotiations.

[7] Specifically, the State offered:

> 1. The State would agree to allow the Tribe to operate an additional 900 Gaming Devices outside of the licensing pool established by the Tribe's existing compact as long as the total number of Gaming Devices in operation by the Tribe do [sic] not exceed 2500 Gaming Devices[;]
>
> 2. The Tribe would be required to maintain its existing Gaming Device licenses, but the parties would negotiate over the amount of the contributions made by the Tribe to the [RSTF] in connection therewith;
>
> 3. The Tribe would pay annually to the State 15% of the average net win for each of the additional Gaming Devices outside of the licensing system that it

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Rincon countered that, in order to obtain additional devices, it would agree to some per device fees. Rincon emphasized, however, that the use of any fees it paid had to be limited to paying for the costs of regulating gaming, building infrastructure needed to support gaming operations, and mitigating adverse impacts caused by gaming operations. Rincon further stated that "with all due respect, we are not asking for exclusivity and the State's analysis does not hold water as it relates to Rincon in its current circumstance."

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operates pursuant to the compact amendment, provided that the average net win is calculated on the basis of all Gaming Devices operated by the Tribe;

4. The Tribe would pay to the State, for the duration of the compact term, an annual fee equal to 15% of the net win in Fiscal Year 2004 from the Gaming Devices in operation at the Tribe's casino;

5. The term of the amended compact would be the same as that of the existing compact;

6. A portion of the Tribe's payment to the State could be designed for San Diego County and CalTrans, which amount would be negotiated between the Tribe and the State . . . [;]

7. Except as set forth in paragraphs 5 and 8, the amendment would contain the same non-economic provisions as the Pala Compact Amendment;

8. The Tribe [would] be afforded an exclusivity provision, the terms of which [would] be subject to further negotiation . . . [but] the exclusivity provisions would be "similar" to the Pala compact amendment. . . .

Rincon also noted that Proposition 1A already provided for tribal gaming exclusivity, so it was not seeking whatever further exclusivity might provide. Rincon's lands are located in the middle of a saturated tribal gaming market. Accordingly, no form of tribal exclusivity could shelter Rincon from substantial competition. As long as the proposed exclusivity provision related only to freedom from *non*-tribal competition, "exclusivity" would not provide Rincon with any meaningful economic advantages that would warrant the tribe making the requested payments.

The State interpreted Rincon's counterproposal for limited-use, per device fees and its rejection of exclusivity to be a request that the State agree to allow Rincon to operate additional devices beyond the 1999 compact limits "without offering the State anything meaningful in return." The State held firm in its demand that a portion of tribal gaming revenues be paid into the State's general fund, rather than into an earmarked fund.

Rincon re-countered with an offer substantially mirroring its previous offer, but offering slightly increased per device fees. Rincon also presented several expert reports on the financial impact the State's offer would have on Rincon. By Rincon's calculations,

> the State's offer . . . would require Rincon to pay an additional $23 million in fees for the machines currently in play at Rincon's gaming operation pursuant to the 1999 Compact. . . . By imposing the 15% fee on the

> Tribe's net win as of Fiscal year 2004, the Tribe would be required to pay 15 to 20 times what it is paying now without adding a single machine onto the gaming floor! The State's proposal is a poorly disguised tax, which is impermissible under IGRA.

The State made its next counteroffer on October 23, 2006. That offer included substantially the same terms as its November 10, 2005 offer, but offered that the compact term would be extended for five years, and that Rincon would pay an annual fee equal to 10% (instead of 15%) of its net win based on fiscal year 2005 (instead of 2004). The State noted that the terms it was offering Rincon were similar to those already accepted by a handful of other tribes and approved by the Department of the Interior. At Rincon's request, on October 31, 2006, the State made an alternative offer to allow Rincon to operate 400 additional devices with no other changes to the existing compact. In exchange for the 400 additional devices, Rincon would have to pay $2 million annually to the RSTF, plus 25% of Rincon's net win on those additional 400 devices to the State's general fund.

The State accompanied this last counteroffer with its own expert analysis comparing the value to Rincon of continuing to operate its current 1600 devices under the 1999 compact to the value to Rincon of accepting the State's counteroffer of 2500 devices with a 10% annual fee. The State's expert concluded that if Rincon accepted the State's offer, it would pay California $38 million and retain $61

million in net revenue. If Rincon maintained its operations under the 1999 compact, it would pay the State nothing and retain $59 million in net revenue. Hence, according to the State's expert, Rincon stood to gain $2 million in additional revenues if it accepted the amendment. In contrast, the State stood to gain $38 million. Rincon rejected the State's counteroffer, and the record of negotiations then closed.

Having reached an impasse, the parties filed cross-motions for summary judgment in the district court. The district court granted summary judgment in favor of Rincon, and this timely appeal followed.

JURISDICTION AND STANDARD OF REVIEW

IGRA grants district courts original federal jurisdiction over tribal claims that a state has failed to negotiate in good faith concerning class III gaming rights. 25 U.S.C. § 2710(d)(7)(A)(i). California has waived its Eleventh Amendment immunity from such suits.[8] Cal. Gov't Code § 98005; *Hotel Employees*, 981

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[8] Many states have not waived their Eleventh Amendment immunity under IGRA as California has. The dissent's reliance on the prevalence of compacts containing revenue sharing provisions is therefore suspect because that reliance ignores the fact that many of the states involved in those compacts would not permit tribes to challenge state demands as made in bad faith. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that IGRA did not abrogate state Eleventh Amendment immunity, so Florida state actors could not be sued by tribe to force good faith negotiations); *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1384-85 (10th Cir. 1997) (holding

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P.2d at 1011. We have jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1).

Summary judgment is appropriate if there is no genuine issue of material fact and, even making all reasonable inferences in favor of the nonmoving party, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 742 (9th Cir. 2004). The State argues that the district court erred in granting

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that New Mexico has not waived its Eleventh Amendment immunity to IGRA suits); *Ponca Tribe of Okla. v. Oklahoma*, 89 F.3d 690 (10th Cir. 1996) (same for Oklahoma); *Santee Sioux Tribe of Neb. v. Nebraska*, 121 F.3d 427, 431 (8th Cir. 1997) (same for Nebraska); *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484 (W.D. Mich. 1992) (same for Michigan). Tribes in states that have not waived their Eleventh Amendment immunity for IGRA suits have no recourse to challenge the validity of revenue sharing, and some therefore choose to accept revenue sharing rather than go without a compact. *See Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 51, 56-57 & n.7 (D.D.C. 1999) (explaining that the Department of the Interior believed the revenue sharing provision was illegal, but also believed that it had no choice but to allow the compact to go into effect because the tribe would have no recourse against the state to obtain a legal compact). Moreover, this reality – for better or worse – will prevent the proliferation of lawsuits feared by our dissenting colleague. The dissent suggests that 25 C.F.R. §§ 291.1 *et seq.* is a potential vehicle for tribes to challenge state demands, Dissent at 5971. n.27, but the only circuit court to consider the question has held the regulations invalid. *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), *cert. denied sub nom. Kickapoo Traditional Tribe of Tex. v. Texas*, 129 S. Ct. 32 (2008). The validity of the regulations is not before us, and we therefore do not find it appropriate to rely on them, or express any opinion as to their validity.

summary judgment against it on the issue of whether it negotiated in good faith. *See* 25 U.S.C. § 2710(d)(7)(B)(iii-iv). Whether the negotiations were conducted in good faith is a mixed question of law and fact that we review de novo. *Coyote Valley II*, 331 F.3d at 1107 (citing *Diamond v. City of Taft*, 215 F.3d 1052, 1055 (9th Cir. 2000)).

DISCUSSION

From the advent of colonists in North America, the new arrivals promptly began encroaching on Indian lands, and frequently treating Indians unfairly. To protect against further "great Frauds and Abuses" perpetrated by the colonists against the Indians, and to avoid war, the British Crown assumed ultimate authority over Indian affairs. 1-1 Cohen's Handbook on Fed. Indian Law § 1.02 (Matthew Bender 2009). When our nation was formed, the federal government essentially took the place of the Crown, with Congress being granted the power to "regulate Commerce . . . with the Indian tribes," U.S. Const. art. I, § 8, cl. 3, and the President being given the power to make treaties (including with Indian tribes) with the consent of the Senate. U.S. Const. art. II, § 2, cl. 2. According to the Supreme Court, the federal government's relationship to the tribes was that of a "ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Nevertheless, promises and treaties were repeatedly broken or ignored as Indians were swept from their lands and homes by states, hoards of settlers, and sometimes

even by the "guardian" federal government itself, when they wanted the lands or resources possessed by those Indians. *See* Cohen's, *supra,* at §§ 1.02-1.03. Recounting one such instance, the Supreme Court in *United States v. Sioux Nation of Indians* detailed the history of how, first by military force, then by Congressional act, the government deprived the Sioux tribe in South Dakota of much of its land because gold was discovered in the Black Hills. 448 U.S. 371 (1980). Today, many tribes have struck figurative gold with casino gaming and, again, some state governments, just like their predecessors, are maneuvering to take, or at least share in, some of that figurative gold.

Mindful of this ignominious legacy, Congress enacted IGRA to provide a legal framework within which tribes could engage in gaming – an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long eluded their grasp – while setting boundaries to restrain aggression by powerful states. *See* S. Rep. No. 100-446, at 33 (1988) (statement of Sen. John McCain), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3103; 134 Cong. Rec. at S12654 (statement of Sen. Evans). In passing IGRA, Congress assured tribes that the statute would always be construed in their best interests. *See, e.g.,* S. Rep. No. 100-446, at 13-14, *as reprinted in* 1988 U.S.C.C.A.N. at 3083-84.

Under IGRA, a tribe may conduct class III gaming only once a compact with its home state is in effect. Because the compact requirement skews the

balance of power over gaming rights in favor of states by making tribes dependent on state cooperation, IGRA imposes on states the concomitant obligation to participate in the negotiations in good faith. 25 U.S.C. § 2710(d)(3)(A). If a court finds that a state has failed to negotiate in good faith, IGRA empowers the court to order additional negotiations and, if necessary, to order the parties into mediation in which a compact will be imposed. § 2710(d)(7).

In evaluating a State's good faith, the district court:

> (I) *may* take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
>
> (II) *shall* consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

§ 2710(d)(7)(B)(iii) (emphasis added); *see Coyote Valley II*, 331 F.3d at 1108-09 (quoting at length S. Rep. No. 100-446, at 13-14, *as reprinted in* 1988 U.S.C.C.A.N. at 3083-84, which provides guidance on how Congress intended § 2710(d)(7)(B)(iii)(I) to be interpreted).

In addition to specifying criteria for evaluating a state's good faith, IGRA outlines permissible tribe-state negotiation topics.

> (C) Any Tribal-State compact . . . may include provisions relating to –
>
> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

§ 2710(d)(3)(C). However, the list of permissible negotiation topics is circumscribed by one key limitation on state negotiating authority:

> Except for any assessments that may be agreed to under [§ 2710(d)(3)(C)(iii)], nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe. . . . No State may refuse to enter into the negotiations . . . based upon the lack of authority in such State . . . to impose such a tax, fee, charge, or other assessment.

25 U.S.C. § 2710(d)(4). IGRA limits permissible subjects of negotiation[9] in order to ensure that

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[9] Our dissenting colleague suggests that § 2710(d)(3)(C) is not exhaustive, and then goes on to say that even if it is, reading the "catch-all" provision, § 2710(d)(3)(C)(vii), restrictively conflicts with *Coyote Valley II*. Dissent at 5947-51. The language and structure of § 2710(d)(3)(C) suggests it is exhaustive. There are seven categories of what "may" be negotiated. Although "may" indicates permissiveness as the dissent explains, to grant permission is not necessarily to grant carte blanche. What is "permitted" is limited. Section 2710(d)(C)(vii) explicitly addresses unenumerated topics, but limits them to those "directly related" to gaming. *See Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 933-34 (7th Cir. 2008) (reading § 2710(d)(3)(C) as exhaustive for jurisdictional purposes); *see also Coyote Valley II*, 331 F.3d at 111 (noting that Congress "*limit[ed]* the proper topics for compact negotiations to those that bear a direct relationship to the operation of gaming activities" (emphasis added)). Significantly, what compels a limited reading of the permitted topics is the canon of construction obligating us to construe a statute abrogating tribal rights narrowly and most favorably towards tribal interests. *See United States v. Winans*, 198 U.S. 371, 381 (1905) (stating that "the treaty was not a grant of rights to the Indians, but a grant of right from them, – a reservation of those [rights] not granted"); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) ("[I]n construing this admittedly ambiguous statute, we

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tribal-state compacts cover only those topics that are related to gaming[10] and are consistent with IGRA's stated purposes, *see Coyote Valley II,* 331 F.3d at 1111, which are:

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must be guided by that eminently sound and vital canon that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians." (internal quotation marks, citations, and ellipsis omitted)). The dissent is correct that *Coyote Valley II* held that § 2710(d)(3)(C)(vii) is not ambiguous, and we do not hold otherwise. Whether revenue sharing fits into the unambiguous phrase "directly related to gaming" however is a subject of significant dispute between the parties. To help resolve the dispute, we, like the *Coyote Valley II* court, consider relevant the Congressional directive to construe ambiguities related to the issues covered by IGRA most favorably to tribal interests. *Coyote Valley II,* 331 F.3d at 1111 (quoting S. Rep. No. 100-446, at 15, reprinted in 1988 U.S.C.C.A.N. at 3085). Even if the dissent is correct that resolution of this issue features a clash of "dueling canons," Congress' specific invocation of the tribal canon persuades us which canon must triumph here.

[10] "Gaming by its very nature is a unique form of economic enterprise and the Committee is strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future." S. Rep. No. 100-446, at 14, *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3084. *See also* 134 Cong. Rec. S12643-01, at S12651 (1988) ("There is no intent on the part of Congress that the compacting methodology be used in such areas such as taxation, water rights, environmental regulation, and land use. . . . The exigencies caused by the rapid growth of gaming in Indian country and the threat of corruption and infiltration by criminal elements in class III gaming warranted the utilization of existing State regulatory capabilities in this one *narrow* area.") (statement of Sen. Inouye) (emphasis added).

> (1) to provide a statutory basis for the operation of gaming by Indian tribes *as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments*;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, *to ensure that the Indian tribe is the primary beneficiary of the gaming operation,* and to assure that gaming is conducted fairly and honestly by both the operator and players; and
>
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and *to protect such gaming as a means of generating tribal revenue.*

§ 2702 (emphasis added); *see also Artichoke Joe's*, 353 F.3d at 715.

Here, the State repeatedly demanded that Rincon agree to pay into the State's general fund 10-15% of Rincon's annual net win, and up to 25% of Rincon's revenue from any new devices Rincon would operate under an amended compact. Once Rincon proffered evidence suggesting that the State had acted in bad faith by attempting to impose taxation, "the burden of proof [shifted to] the State to prove that the State has

negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities." § 2710(d)(7)(B)(ii). We conclude that the State failed to meet its burden.

I. Taxation Demands "Shall" Be Considered Evidence of Bad Faith

Under § 2710(d)(7)(B)(iii)(II), a court *must* consider a "demand" for a tax to be made in bad faith.[11] A tax is "a *charge,* usu[ally] *monetary, imposed* by the government on persons, *entities, transactions,* or property *to yield public revenue.*" Black's Law Dictionary 1594 (9th ed. 2009) (emphasis added). The State insisted that Rincon pay at least 10% of its net profits into the State's general fund. According to California Government Code § 16300, "[t]he General Fund consists of money received into the treasury and not required by law to be credited to any other fund." No amount of semantic sophistry can undermine the obvious: a non-negotiable, mandatory payment of 10% of net profits into the State treasury for unrestricted use yields public revenue, and is a "tax." Moreover, unlike what occurred in the 1999 negotiations, none of the State's communications during the

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[11] In *Coyote Valley II* we were convinced that any inference of bad faith had been rebutted, so we did not need to address this threshold inquiry into whether the RSTF and SDF were taxes demanded by the State. Because the bad faith question is more difficult in this case, we commence with the threshold inquiry.

renegotiations that occurred after the change in administration in 2003 reflected a willingness to take its *general fund* revenue sharing demand off the table. The State repeatedly emphasized its position that it would not give Rincon more devices or time without a reciprocal benefit to the State, and the record reveals that no other "benefit" was demanded besides monetary payments into the general fund. Webster's Third New International Dictionary 598 (2002) defines "demand" as "to call for as useful, necessary, or requisite: make imperative." The State's repeated and forceful insistence on monetary payments to the general fund undoubtedly constitutes a "demand." Under the plain language of § 2710(d)(7)(B)(ii)(II), the State's demand for the payment of a tax is evidence of the State's bad faith.

Our dissenting colleague faults us for our characterization of the 10-15% revenue share as a "tax," primarily because he contends we fail to appreciate the import of the word "imposed" in the definition of a "tax." Dissent at 5934-37, 5943-45. He argues that IGRA merely creates a context for "voluntary" negotiations, and that no matter how "hard line" the State's position is, it still has not attempted to exercise authority to "impose" a tax.

The flaw in this argument – related to a faulty assumption made throughout the dissent – is that it ignores the plain fact that neither tribes nor states enter IGRA negotiations "voluntarily" in the way parties do in all the examples cited by the dissent. IGRA negotiations are therefore distinguishable from

regular contract negotiations. When private parties, or independent sovereign entities, commence contract negotiations, they generally do so because each has something of value the other wants, and each side has the right to accept or reject an offer made, based on the desirability of the terms. If negotiations fail, neither party has a right to complain. Not so in IGRA negotiations. In IGRA, Congress took from the tribes collectively whatever sovereign rights they might have had to engage in unregulated gaming activities, but imposed on the states the obligation to work with tribes to reach an agreement under the terms of IGRA permitting the tribes to engage in lawful class III gaming activities. If IGRA negotiations break down between a state and a tribe because the state does not come to the bargaining table in good faith, IGRA specifically provides that courts, and the Secretary of the Interior, can intervene to impose a gaming arrangement without the affected state's approval. *See* § 2710(d)(7)(B)(iii-vii). Thus, while IGRA was designed to give states a voice in Indian gaming, it was not designed to give states complete power over tribal gaming such that each state can put the opportunity to operate casinos up for sale to the tribe willing to pay the highest price. *See* § 2702; *see also Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993) (noting that IGRA imposes mandatory duties upon states and gives them incentives to negotiate, but that it also provides tribes with alternative routes to a compact if the states choose not to cooperate); *Dalton v. Pataki*, 835 N.E.2d 1180, 1189 (N.Y. 2005) ("IGRA confers a benefit on the state

by allowing it to negotiate and to have some input into how class III gaming will be conducted.").

The dissent claims that § 2710(d)(4) means only that IGRA should not be interpreted as "*conferring*" upon states the "*authority to impose*" taxes and fees. Dissent at 5925-26. But nothing in IGRA can reasonably be construed as conferring on states the power to impose anything; all the states are empowered to do is negotiate. The logic underlying the dissent is that there is no "imposition" when there is "negotiation." But by that logic, not only may states demand revenue sharing like California has done here, they could take any "hard-line" stance, such as demanding that a tribe agree to waive its sovereign immunity from taxation, as a condition of obtaining more gaming devices. No one disputes that requiring a tribe to waive its sovereign immunity from state taxation in order to obtain a compact is clearly contrary to IGRA. And yet, if a tribe "agreed" to do so, the waiver of taxation immunity would be no less "negotiated" than the revenue sharing the dissent advocates here.

Exercising an authority to "impose" in the context of IGRA must therefore relate to something the state does during the negotiations process to extract an improper concession. In other words, the only conceivable way a state could "impose" something during negotiations is by insisting, over tribal objections, that the tribe make a given concession – a concession beyond those specially authorized by

§ 2710(d)(3)(C)[12] and contrary to the tribe's sovereign interests – in order to obtain a compact.[13]

The dissent acknowledges that in this case "California has insisted that the Band share its gaming revenues as a condition to receiving authorization for additional gaming devices," but then concludes that this is simply "hard-line" negotiating for revenue sharing, not imposing a tax. Dissent at 5933. If there is a distinction between insisting on obtaining a share of Rincon's income as a non-negotiable condition of granting it a compact, and demanding a tax or "refus[ing] to enter into the negotiations . . . based upon the lack of authority . . . to impose such a

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[12] Indeed, the dissent overlooks the significance of § 2710(d)(4)'s introductory phrase: "Except for any assessments that may be agreed to under [§ 2710(d)(3)(C)(iii)]." Thus, § 2710(d)(4) clearly contemplates which fees may be "agreed to," and subsequently imposed by the state, in exchange for basic gaming rights: only those described in § 2710(d)(3)(C)(iii).

[13] Under § 2710(d)(4), it is not only "taxes" that are precluded, it is *any* "tax, fee, charge, or other assessment." Even if the dissent were correct that the fees are not "taxes," we fail to see how the State's demands, which the State itself described as "annual fees," do not run afoul of this provision. The importance of the fact that the "demand" was for a "direct tax" only matters as to the question of whether the court is *required* to take the demand as evidence of bad faith under § 2710(d)(7)(B)(iii)(II), which refers to direct taxation but not the other sorts of extracted payments named in § 2710(d)(4). But under § 2710(d)(7)(B)(iii)(II), the language is clear that what matters is the State's "demand" for the tax. This shows that the analysis must focus on what states "demand," not what they may think they have the authority to "impose" in the way the dissent interprets that term.

tax, fee, charge, or other assessment," § 2170(d)(4), it is a distinction without a difference. In either case, the state is using its power over negotiations to force Rincon to pay the State a portion of its income into the State's general fund (and not for any use for the benefit of Rincon or other tribes) in order to engage in class III gaming. If § 2710(d)(4) means anything, it means that California cannot do that – whatever one calls it.[14]

In *Coyote Valley II*, we explained that IGRA requires courts to consider a state's demand for taxation as evidence of bad faith, not conclusive proof. 331 F.3d at 1112-13 (citing § 2710(d)(7)(B)(iii)(II)). However, "[d]epending on the nature of both the fees demanded and the concessions offered in return, such demands might, of course, amount to an attempt to impose a fee, and therefore amount to bad faith on the part of a State." *Coyote Valley II*, 331 F.3d at 1112 (internal quotation marks omitted). For the reasons described in greater detail *infra*, when the "nature of the fees" is *general fund* revenue sharing – a bald demand for payment of a tax – the State faces a very

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[14] Even if we were to accept the dissent's interpretation of the meaning of §§ 2710(d)(3)(C) and 2710(d)(4), that would only mean that IGRA is silent on the issue of revenue sharing. The dissent takes silence as authorization, but in doing so forgets that this is a statute affecting Indian tribes. As such, we are obligated to construe ambiguities in the statute most favorably towards tribal interests, which means that we are obligated to construe the silence as a withholding of state authority to negotiate for that term. *See Bryan*, 426 U.S. at 392.

difficult task to rebut the evidence of bad faith necessarily arising from that demand. *See* § 2710(d)(3)(B)(iii)(II).

Under IGRA, the State may attempt to rebut bad faith by demonstrating that the revenue demanded was to be used for "the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities." § 2710(d)(3)(B)(ii). *See* S. Rep. No. 100-446, at 13-14, *as reprinted in* 1988 U.S.C.C.A.N. at 3083-84. The State's need for general tax revenues is not in the list. Even if "the public interest" or "financial integrity" could conceivably be construed to implicate the State's need for general funds, IGRA's purposes do not permit such a construction. Instead, those terms clearly apply to protecting the State against the adverse consequences of gaming activities. *See* § 2702; S. Rep. No. 100-446, at 13-14, *as reprinted in* 1988 U.S.C.C.A.N. at 3083-84. Moreover, construing those terms broadly in favor of the State's interests would be inconsistent with our obligation to construe IGRA most favorably towards tribal interests. *See Artichoke Joe's*, 353 F.3d at 728-30 (discussing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985)); *see also* S. Rep. No. 100-446, at 15, *as reprinted in* 1988 U.S.C.C.A.N. at 3085 (stating Congressional intent that courts interpret any ambiguities regarding § 2710(d)(3)(B)(ii)(I) in the way most favorable to tribal interests).

Critically, the State does not even seek to justify its general fund revenue sharing demands directly

under any of the factors in § 2710(d)(7)(B)(ii)(I).[15] Rather, the State relies on its interpretation of our decision in *Coyote Valley II*. The State's reliance is misplaced. *Coyote Valley II* is an exceptional case whose facts are readily distinguishable from those in this case.

II. *Coyote Valley II*

Coyote Valley II considered objections to, among other things, the RSTF and SDF provisions of the 1999 compacts. We held those funds to be authorized subjects of negotiation under 25 U.S.C. § 2710(d)(3)(C)(vii) (subjects "directly related to the operation of gaming"). The SDF was clearly "directly related" to gaming because all uses of SDF funds were earmarked for gaming-related purposes. *Coyote Valley II*, 331 F.3d at 1114. The RSTF funds similarly were related to gaming because, by redistributing gaming funds from gaming to non-gaming tribes, they are entirely consistent with the IGRA goal of using gaming to foster tribal economic development. *Id.* at 1111. Notably, we expressly declined to decide if the RSTF or SDF were

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[15] The State's offers include reference to its desire to limit the number of gaming devices operating in the State. Although a desire to prevent excessive proliferation of casinos and gambling devices would likely be a legitimate interest justifying State refusal to permit a tribe to expand its gaming operations, such an interest is not at issue here. The State does not rely on that interest in this case, *but cf. supra* n. 3, nor could the State credibly do so since it has shown its willingness to permit nearly unlimited gaming *if the price is right*.

"taxes," because they were decidedly not "imposed" in bad faith. Rather, the tribes themselves suggested them, and were willing to pay into them in exchange for the "meaningful concession" of constitutional exclusivity. *Id.* at 1112-15.

Coyote Valley II thus stands for the proposition that a state may, without acting in bad faith, request revenue sharing *if* the revenue sharing provision is (a) for uses "directly related to the operation of gaming activities" in § 2710(d)(3)(C)(vii), (b) consistent with the purposes of IGRA, and (c) not "imposed" because it is bargained for in exchange for a "meaningful concession." The State's offers in this case fail on all three prongs of that proposition.

A. "Directly Related to the Operation of Gaming Activities"

The State asserts that, like the RSTF and SDF, its revenue sharing demands were authorized under § 2710(d)(3)(C)(vii) because they involve a subject directly related to gaming. The State misunderstands.

The State's argument that general fund revenue sharing is "directly related to the operation of gaming activities" because the money is paid out of the income from gaming activities is circular. Moreover, the very next section of the statute precludes us from interpreting § 2710(d)(3)(C)(vii) in the way the State suggests. *See* § 2710(d)(4) (stating explicitly that states are not authorized to use negotiations to

impose assessments on tribes *other than those "agreed to under paragraph (3)(C)(iii)"* (emphasis added)); *see also Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 932 (7th Cir. 2008) (describing revenue sharing agreements as being in tension with § 2710(d)(4)).

Crucially, in *Coyote Valley II* we did not conclude that § 2710(d)(3)(C)(vii) authorized the RSTF and SDF because "revenue sharing" is a subject directly related to gaming. Rather, we held that fair distribution of gaming opportunities and compensation for the negative externalities caused by gaming are subjects directly related to gaming, and the RSTF and SDF were the means chosen by the parties to the 1999 compacts to deal with those issues. *See Coyote Valley II*, 331 F.3d at 1111, 1114.

Whether revenue sharing is an authorized negotiation topic under § 2710(d)(3)(C)(vii) thus depends on the *use* to which the revenue will be put, not on the mere fact that the revenue derives from gaming activities. General fund revenue sharing, unlike funds paid into the RSTF and SDF, has undefined potential uses. *See* Cal. Gov. Code § 16300 (providing that the "General Fund consists of money received into the treasury and not required by law to be credited to any other fund."). Therefore, payments into the general fund cannot be said to be directly related to gaming. Indeed, in *Coyote Valley II* we expressly recognized the distinction between *general fund*

revenue sharing and the RSTF and SDF.[16] We noted that the RSTF "provision does not put tribal money into the pocket of the State," *id.* at 1113, and reserved the question of whether the SDF would be lawful if the funds were deposited straight into the State's general fund, *id.* at 1114 n.17. Consequently, we hold that general fund revenue sharing is not "directly related to the operation of gaming activities" and is thus not an authorized subject of negotiation under § 2710(d)(3)(C)(vii). *See Cabazon Band of Mission Indians v. Wilson,* 37 F.3d 430, 435 (9th Cir. 1994) (holding that where fees go to the state's general fund, the relationship between the revenue payments

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[16] This distinction also gave the Seventh Circuit pause in *Ho-Chunk Nation.*

> While we decline to use the case before us to weigh in on [the contentious issue of revenue sharing], we do note that the terms of the revenue-sharing agreements at issue in *In re Indian Gaming* are distinct from the one contained in the Compact between the Nation and the State. In *In re Indian Gaming,* the state's use of the payments made by the tribes was heavily restricted, with all payments placed in two funds, one of which distributed gaming revenue amongst non-gaming tribes, with the other designed to fund programs to treat gambling addiction, support local agencies impacted by Indian gaming, and finance other costs directly related to gaming operations. Here, however, the Nation's payments to the State are made without any restrictions or limits on the manner in which the State may use those funds.

512 F.3d at 932 (internal citations omitted).

and the costs incurred in regulating gaming activities is attenuated).

Ruling out § 2710(d)(3)(C)(vii) (authorizing negotiations over subjects directly related to gaming not otherwise listed in § 2710(d)(3)(C)) makes the applicability of § 2710(d)(4) (withholding authority to impose taxes or fees other than those permitted under § 2710(d)(3)(C)(iii)) even more apparent. The State was admittedly seeking "annual fees" and objected to Rincon's suggestion that any fees be limited to § 2710(d)(3)(C)(iii) uses. That, combined with the general notion that IGRA negotiations are supposed to be limited to gaming regulation, convinces us that there is no statutory basis for authorizing tribe-state negotiations over general fund revenue sharing. *See Ho-Chunk Nation,* 512 F.3d at 932-33 (declining to decide whether general fund revenue sharing is invalid, but noting that it was apparently not a subject "contemplated by Congress as being one of the matters tribes and the states may negotiate over under the IGRA").

B. Consistent with the Purposes of IGRA

According to § 2702, IGRA is intended to promote tribal development, prevent criminal activity related to gaming, and ensure that gaming activities are conducted fairly. In *Coyote Valley II* we construed the meaning of subjects "directly related to the operation of gaming" in § 2710(d)(3)(C)(vii) broadly to include revenue sharing because the RSTF is consistent with

the plain language of § 2702 (listing tribal economic self-sufficiency as one of IGRA's purposes). *See Coyote Valley II*, 331 F.3d at 1111. By contrast, we cannot read § 2710(d)(3)(C)(vii) broadly here to include general fund revenue sharing because none of the purposes outlined in § 2702 includes the State's general economic interests. The only *state* interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly. § 2702(2); *see also* S. Rep. No. 100-446, at 2, 4, *as reprinted in* 1988 U.S.C.C.A.N. at 3072-73, 3075.

Because the plain language of § 2702 does not support the State's position, the State misconstrues certain statements in *Coyote Valley II* to say that the State's pursuit of its economic interests is at least *not inconsistent* with IGRA. As an initial matter, we are reluctant to inject into the statute a purpose not codified within it. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). But we need not digress into that potentially complicated statutory analysis because the State clearly misinterprets *Coyote Valley II*.

The State first points to our recognition in *Coyote Valley II* that Congress acknowledged as legitimate the State's "economic interest in raising revenue for its citizens." 331 F.3d at 1115 (quoting S. REP. NO. 100-446, at 13, *as reprinted in* 1988 U.S.C.C.A.N. at 3083). The State takes this quotation out of context. The full quotation is:

> A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

Coyote Valley II, 331 F.3d at 1115 (quoting S. Rep. No. 100-446, at 13, *as reprinted in* 1988 U.S.C.C.A.N. at 3083).

Although a grammatical analysis of the sentence could conceivably suggest that a state's "economic interests in raising revenue for its citizens" is one of the "impacts on the State's regulatory system," such a construction would represent a distortion of the text. A more common sense approach to interpreting Congress's meaning here, as taken in *Coyote Valley II*, is to read a state's "interest in raising revenue" as being "included" as one of the "State's other interests." 331 F.3d at 1115. And in context, the "other interests" are the states's own gaming systems like the California Lottery that would, after IGRA, have to compete with Indian gaming. IGRA itself, as well as clearer statements in the legislative history, support this interpretation. *See* § 2710(d)(7)(B)(iii)(I) (listing the state's interest concerning "adverse economic impacts on

existing gaming activities" among the factors relevant to a state's good faith); *see also, e.g.*, S. Rep. No. 100-446, at 1-2, 14, *as reprinted in* 1988 U.S.C.C.A.N. at 3071-72 (acknowledging the problem that States and the gaming industry may attempt to use the compact requirement to impede tribal competition). Thus, neither the statute nor the legislative history support interpreting the phrase "other interests . . . including its economic interest in raising revenue for its citizens" to mean that states may tax tribes. In fact, all indications are to the contrary. *See* § 2710(d)(4); *supra* n.10.

The State next directs us to a similar statement from *Coyote Valley II* that "Congress . . . did not intend to require that States ignore their economic interests when engaged in compact negotiations." *Coyote Valley II*, 331 F.3d at 1115. The State's reliance on this statement is likewise misplaced. When we said that Congress did not intend for states to ignore their economic interests, we were not deciding whether states were allowed to pursue their own economic objectives affirmatively through compact negotiations. Rather, we decided only whether the State could require the tribes to pay into the SDF to cover the government's costs of dealing with the fallout of gaming. It is one thing to ask the tribes to contribute funds so the State is not left bearing the costs for gaming-related expenses; it is quite another to ask the tribes to help fix the State's budget crisis. The State is therefore incorrect that pursuit of state

general economic interests is consistent with IGRA's purposes.

As already explained, IGRA's stated purposes include ensuring that *tribes* are the *primary beneficiaries* of gaming and ensuring that gaming is protected as a means of generating *tribal revenue*. § 2702. We therefore find particularly persuasive the fact that the revenue sharing demanded in this case would result in $38 million in additional net revenue to the State compared to $2 million for the tribe. In such case, it is the State, not the tribe, that would be the "primary beneficiary" of the gaming rights under negotiation. *See Cabazon Band of Mission Indians*, 37 F.3d at 433 (explaining that where the state benefits "from the tribal gaming operation to a considerably greater extent than the [tribe, the tribe would not] be described as a 'primary beneficiary[,' and s]uch an outcome contravenes the purposes of IGRA").

C. "Meaningful Concessions"

Because we hold above that general fund revenue sharing is neither authorized by IGRA nor reconcilable with its purposes, it is difficult to imagine what concessions the State could offer to rebut the strong suggestion of bad faith arising from such demands. But even if it were possible to conjure up an exceptional circumstance where such would be the case, where, as here, the State demands significant taxes *and fails to offer any "meaningful concessions" in*

return, a finding of bad faith is the only reasonable conclusion.

The relevance of "meaningful concessions" arises from § 2710(d)(4). We have interpreted § 2710(d)(4) as precluding state authority to *impose* taxes, fees, or assessments, but not prohibiting states from *negotiating* for such payments where "meaningful concessions" are offered in return. *See Coyote Valley II*, 331 F.3d at 1112; *see also Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006). In other words:

> [t]he theory on which [revenue sharing] payments were allowed [in *Coyote Valley II*] . . . was that the parties *negotiated* a bargain permitting such payments in return for meaningful concessions from the state (such as a conferred monopoly or other benefits). Although the state did not have *authority* to exact such payments, it could bargain to receive them in exchange for a quid pro quo conferred in the compact.

Shoshone-Bannock, 465 F.3d at 1101 (internal citation omitted).

Importantly, we emphasized in *Coyote Valley II* that we were not holding that "the State could have, *without offering anything in return*, taken the position that it would conclude a Tribal-State compact with [the tribe] only if the tribe agreed to pay into the RSTF." 331 F.3d at 1112. But, "[w]here . . . a State offers meaningful concessions in return for fee demands, it does not exercise 'authority to impose'

anything. Instead, it exercises its authority to negotiate, which IGRA clearly permits." *Id.* With this concept in mind, the State argues that it offered "meaningful concessions" and therefore merely exercised its authority to negotiate within the permissible bounds of IGRA.

The State's analogy fails. Unlike in *Coyote Valley II*, in which the tribes proposed the revenue sharing provisions, *see* 331 F.3d at 1113, Rincon did not suggest revenue sharing; indeed, Rincon has consistently objected to it. Additionally, the State has not offered any "meaningful concessions."

Just how "meaningful" the exclusivity provision at issue in *Coyote Valley II* was at the time of the 1999 compacts cannot be overstated. In 1999, the California constitution prohibited casino-style gaming, and the State was therefore under no obligation to allow tribes to conduct it, or even negotiate concerning it. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994). The State nonetheless negotiated the 1999 compacts with dozens of tribes, and to make the 1999 compacts fully operable, the State promoted a constitutional amendment exempting tribes, and tribes alone, from the constitutional prohibition. *Flynt*, 129 Cal. Rptr. 2d at 175-77; *see also Artichoke Joe's*, 353 F.3d at 718.

The value of a monopoly is obvious, and the value of a monopoly that cannot be altered except by the extraordinary act of further constitutional amendment is even greater. Such a benefit was well beyond

anything IGRA *required* the State to offer. *See Coyote Valley II*, 331 F.3d at 1111, 1115. Specifically, IGRA provides that tribes can engage in class III gaming to the same extent as others in the state. § 2710(d)(1). Thus, IGRA only requires that states treat tribes equally. However, with the strong encouragement of the then governor, California voters gave the tribes an economic opportunity denied to everyone else. The State's agreement (with the consent of the voters) to confer such a substantial benefit on the tribes proved that its request that more successful tribes financially assist the less fortunate ones (and that the tribes agree to cover the costs of adverse impacts) was freely negotiated. Indeed, in a rare example of generosity to tribes, the State conferred a valuable economic right on the tribes in exchange for a program under which all of the significant *benefits* of the compact were to be enjoyed by the *tribes* themselves.

In short, we approved exclusivity as a "meaningful concession" in *Coyote Valley II* because it was *exceptionally valuable* and *bargained for*. By contrast, in the current legal landscape, "exclusivity" is not a new consideration the State can offer in negotiations because the tribe already fully enjoys that right as a matter of state constitutional law. Moreover, the benefits conferred by Proposition 1A have already been used as consideration for the establishment of the RSTF and SDF in the 1999 compact. *See Flynt*, 129 Cal. Rptr. 2d at 177. "It is elementary law that giving a party something to which he already has an absolute right is not consideration to support that

party's contractual promise." *Salmeron v. United States*, 724 F.2d 1357, 1362 (9th Cir. 1983). The State asserts that it would be unfair to permit Rincon to keep the benefit of exclusivity conferred by Proposition 1A without holding the tribe to an ongoing obligation to periodically acquiesce in some new revenue sharing demand. While we do not hold that no future revenue sharing is permissible, it is clear that the State cannot use exclusivity as new consideration for new types of revenue sharing since it and the collective tribes already struck a bargain in 1999, wherein the tribes were exempted from the prohibition on gaming in exchange for their contributions to the RSTF and SDF. *Flynt*, 1[illegible] Cal. Rptr. 2d at 177.[17]

The State offers various alternative arguments to support its claim that it offered more than illusory consideration. We find all of the State's arguments unpersuasive.

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[17] We are aware that a few tribes have renegotiated their compacts with the State and accepted general fund revenue sharing in exchange for revised exclusivity. We express no opinion concerning the validity of those compacts. Those tribes agreed that the revised exclusivity offered, and the financial benefits they would receive from amending their 1999 compacts, were satisfactory to them. In this case, to the contrary, the general fund revenue sharing demanded by the State in exchange for a revised exclusivity was not freely accepted by Rincon, and was demonstrably not of significant value to Rincon.

1. *Revised and Expanded Exclusivity*

The State first claims that it offered Rincon *revised and expanded* exclusivity, which had even greater economic value than the exclusivity originally granted by Proposition 1A.

We first note that the State never defined the precise contours of the exclusivity provision it proposed, giving us very little upon which to base a finding that the State has met its burden to show it offered a real, meaningful concession in the form of a new and improved exclusivity provision. However, we assume, as apparently the parties have done, that the revised exclusivity provision would have been similar to the one recently accepted by several other tribes, including the Pala Band of Mission Indians. The Pala Band's exclusivity provision provides that (1) "the State shall not authorize any person or entity other than an Indian tribe . . . to engage in any Gaming Activities . . . within the Tribe's core geographic market" (San Diego, Riverside, Orange, and Los Angeles Counties); and (2) if the State were to breach its obligation to ensure geographic exclusivity, "the Tribe shall have the right to enjoin such gaming" and "the right to cease the payments" due to the State. Such a revised and expanded exclusivity would be practically worthless to Rincon.

Since the passage of a constitutional amendment eliminating tribal gaming exclusivity is extremely

unlikely, neither the injunctive relief[18] nor the monetary[19] remedies contingent upon that event have anything more than speculative value to Rincon. In addition, Rincon did not request or desire a revised local tribal gaming exclusivity provision because such a provision – which would not apply to other tribes – would not protect Rincon against the high degree of *tribal* competition it experiences in its core geographic market. Freedom from *nontribal* competition in its core geographic market therefore provides Rincon with no significant additional economic advantages

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[18] Even if a constitutional amendment eliminating the nontribal casino ban were imminent, the value of the proposed injunctive remedy is questionable. We are unaware of any authority that would permit a court to enjoin a *constitutional amendment* on the grounds that it violated Rincon's *contract*.

[19] The State suggests the amended monetary remedy is superior to the monetary remedy provided under the 1999 compact because, although both compacts provide for the end of revenue sharing in the event exclusivity is lost, the Pala compact amendment permits continued gaming, whereas the 1999 compact requires termination. We are unconvinced that the continuation of gaming regime is better for Rincon than the termination regime. The Pala compact amendment would permit termination of revenue sharing if tribal exclusivity is lost in Rincon's core geographic market (which is a benefit Rincon would not enjoy in any event, *see supra* pp. 1025, 1037-38). The 1999 compact provides for termination whenever tribal exclusivity is lost anywhere statewide. Also, because IGRA requires the State to negotiate with Rincon in good faith, termination may not actually result in a loss of gaming – Rincon could obtain a new compact. Thus, under the 1999 termination option, Rincon has greater opportunities for essentially the same monetary relief.

over whatever value Rincon receives from the statewide exclusivity it already enjoys.

More importantly, even if there were some enhanced value in the proposed revised and expanded exclusivity provision, the calculations presented by the State's *own* expert reveal that the financial benefit to Rincon from the amendments proposed would be negligible: Rincon stood to gain only about $2 million in additional revenues compared to the State's expected $38 million. Thus, in stark contrast to *Coyote Valley II*, the relative value of the demand versus the concession here strongly suggests the State was improperly using its authority over compact negotiations to impose, rather than negotiate for, a fee. *See Coyote Valley II*, 331 F.3d at 1112. Under IGRA and *Coyote Valley II*, that is bad faith.

Our conclusion is buttressed by the fact that the State never wavered from its general fund revenue sharing demands. We do not mean to suggest that the State is guilty of bad faith whenever it takes a "hard line" negotiating position. Indeed, in *Coyote Valley II* we upheld the State's ability to insist on certain provisions. *See Coyote Valley*, 331 F.3d at 1116 (finding that it was not bad faith for the State to insist on a particular labor standards provision). As already suggested *supra*, a "hard line" stance is not inappropriate *so long as* the conditions insisted upon are related to legitimate state interests regarding gaming and the purposes of IGRA. *See* § 2710(d)(3)(B)(iii)(I). We hold only that a state may not take a "hard line" position in IGRA negotiations when it results in a

"take it or leave it offer" to the tribe to either accept nonbeneficial provisions *outside the permissible scope of §§ 2710(d)(3)(C) and 2710(d)(4)*, or go without a compact. *Cf. NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 485 (1960).

2. *More Devices and Time*

The State's next argument is that, at the very least, it is entitled to some new consideration in exchange for giving Rincon expanded gaming rights, and the increased revenue share it requested was the only possible new consideration it could seek.

The State is correct that general contract principles dictate that new or additional consideration for a compact amendment is required. However, as already explained, IGRA does not permit the State and the tribe to negotiate over any subjects they desire; rather, IGRA anticipates a very specific exchange of rights and obligations, defined in §§ 2710(d)(3)(C) and (d)(4). *Cf.*, Cal. Const., art. XV, § 1 (limiting the permissible scope of loan contract negotiations by prohibiting, subject to penalty, negotiation for usurious interest rates).

As held above, general fund revenue sharing is not a state public policy interest directly related to gaming and is not an authorized negotiation topic under § 2710(d)(3)(C). Therefore, gaming rights that tribes are entitled to negotiate for under IGRA, like

device licensing and time, *see* § 2701(d)(3)(C)(vi),[20] cannot serve as consideration for general fund revenue sharing; the consideration must be for something "separate" than basic gaming rights. *See* Dissent at 5957 (quoting Courtney J.A. DaCosta, Note, *When "Turnabout" Is Not "Fair Play": Tribal Immunity under the Indian Gaming Regulatory Act,* 97 Geo. L.J. 515, 543-44 (2009)). In order to obtain additional time and gaming devices, Rincon may have to submit, for instance, to greater State regulation of its facilities or greater payments to defray the costs the State will incur in regulating a larger facility. *See* 25 U.S.C. § 2710(d)(3)(C)(i, iii). Rincon need not, however, submit to demands that it assist the State in addressing its budget crisis.

We are further influenced by the fact that the Department of the Interior, the executive agency charged with approving gaming compacts, also interprets IGRA in this way. As stated by the Assistant Secretary of Indian Affairs,

> It is the position of the Department to permit revenue-sharing payments in exchange for *quantifiable* economic benefits *over which the State is not required to negotiate under IGRA,* such as substantial exclusive rights to

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[20] "[L]icensing issues under clause vi may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility." S. Rep. No. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3084.

> engage in Class III gaming activities. We have not, nor are we disposed to, authorize revenue-sharing payments in exchange for compact terms that are routinely negotiated by the parties as part of the regulation of gaming activities, such as duration, number of gaming devices, hour [sic] of operation, and wager limits.[21]

To hold otherwise would effectively mean that states could put gaming rights "up for sale."[22] That would be inconsistent with IGRA's spirit, and its express refusal to allow states to use their right to engage in compact negotiations as a means to extract fees. § 2710(d)(4).

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[21] We take judicial notice of this statement by the Assistant Secretary pursuant to Federal Rule of Evidence 201.

[22] Congress considered amending IGRA in 2003, although no definitive action has since been taken. During the discussions, a representative from the Department of the Interior stated to Congress that the Department was seriously concerned about having to make decisions about the legitimacy of revenue sharing agreements, and wanted Congress to give it clear guidance so that it could avoid seeing "more and more of these revenues going to the States under these compacts." S. HRG. 108-475, at 33-34 (statement of Acting Deputy Assistant Sec'y for Policy and Econ. Dev. for the Dep't of the Interior Skirbine). The Department representative summarized, "we do not believe it was the intent of IGRA to have all the provisions up for sale." *Id.* at 33.

3. *"Exclusive Gaming Rights"*

Next, the State argues that the value of its offers during compact negotiations should be analyzed as a whole, not piecemeal. Specifically, the State contends that we should evaluate its offer not simply by considering the value of the exclusivity provision itself, but rather the value of the entire bundle of "exclusive gaming rights" that Rincon would obtain under an amended compact. Viewing its offer in this way, the State contends it negotiated in good faith.

If there is a meaningful distinction between "exclusivity" and "gaming rights" as stand alone terms and "exclusive gaming rights," it is too minuscule to see. Because exclusivity exists independent of the current compact negotiations, the *negotiations* concern only the extent of gaming rights, which are, by nature as a result of California constitutional law, exclusive. Were we to accept the State's view that whenever it negotiates with a tribe, it offers "meaningful concessions" because the gaming rights offered will, as a matter of law, be exclusive, we would effectively be holding that, as a matter of law, the State is entitled to insist on significant general fund revenue sharing whenever a tribe wants to renegotiate basic terms. We reject the State's view. As explained in Part II.C.2, *supra,* IGRA entitles tribes to negotiate for basic class III gaming rights without being forced to accept revenue sharing.

Further, we disagree that the State makes "meaningful concessions" whenever it offers a bundle

of rights more valuable than the status quo.[23] As previously explained, IGRA endows states with limited negotiating authority over specific items. Accepting the State's "holistic" view of negotiations would permit states to lump together proposals for taxation, land use restrictions, and other subjects along with IGRA class III gaming rights. Such a construction of IGRA would violate the purposes and spirit of that law.[24] *See supra* n.10.

III. Other Evidence of Good Faith

The State raises one final argument in support of its position. Specifically, the State contends that it genuinely believed its revenue sharing demands were authorized by *Coyote Valley II*, approved by the

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[23] The dissent takes this statement out of context. At oral argument, the State argued that as long as the tribe would be better off with the new compact concerning "exclusive" gaming rights than the tribe was under its old one, the State could demand revenue sharing as its reward. Although we do not inquire into the adequacy of consideration as a general rule, when the consideration must necessarily be divided into two parts – that which IGRA contemplates and that which is outside of IGRA – we cannot bundle the rights being negotiated and compare the whole to the status quo as our method for determining whether the concessions are meaningful. The consideration in exchange for the revenue sharing must be independently meaningful in comparison to the status quo, i.e. not illusory (or illegal) if standing alone.

[24] "I hope the States will be fair and respectful of the authority of the tribes in negotiating these compacts and not take unnecessary advantage of the requirement for a compact." 134 Cong. Rec. at S12651 (statement of Sen. Inouye).

Department of the Interior, and fair because other tribes had accepted them. The State therefore urges us to find that its demands, even though herein held improper under IGRA, were nonetheless made in good faith.

IGRA does not provide express guidance about whether good faith is to be evaluated objectively or subjectively. However, we are influenced by the factors outlined in § 2710(d)(7)(B)(iii), which lend themselves to objective analysis and make no mention of unreasonable beliefs. Further, the structure and content of § 2710(d) make clear that the function of the good faith requirement and judicial remedy is to permit the tribe to process gaming arrangements on an expedited basis, not to embroil the parties in litigation over their subjective motivations. We therefore hold that good faith should be evaluated objectively based on the record of negotiations, and that a state's subjective belief in the legality of its requests is not sufficient to rebut the inference of bad faith created by objectively improper demands.[25] *See*

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[25] Interestingly, on the question of the scope of discovery permissible in IGRA negotiations, the State has taken the position that good faith should be proved based on the objective course of negotiations. *See also Fort Independence Indian Cmty. v. California*, No. Civ. S-08-432, 2009 WL 1283146, at *3 (E.D. Cal. May 7, 2009) (agreeing with the State that good faith should be based on objective factors). The State cannot have it both ways. If the State wants to avoid discovery and limit review of good faith to the official record of negotiations, the State cannot defend itself on the good faith question by claiming its

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Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1033 (2d Cir. 1990) ("The statutory terms are clear, and provide no exception for sincere but erroneous legal analyses.").

Here, the State's belief that IGRA permitted the revenue sharing it sought was objectively unreasonable. IGRA expressly condemns state attempts to compel fees for purposes other than those specified in § 2710(d)(3)(C)(iii). The State does not even attempt to fit its general fund revenue sharing demand within § 2710(d)(3)(C)(iii). While *Coyote Valley II* held that § 2710(d)(3)(C)(vii) might also authorize revenue sharing, that case involved exceptional circumstances and turned on the specialized, limited uses of the revenue. As explained *supra*, the rationale for permitting revenue sharing under 2710(d)(3)(C)(vii) in *Coyote Valley II* is not present in this case, and the State was unreasonable to rely on *Coyote Valley II* for propositions not decided, or expressly reserved. *See supra* pp. 5897-99. Further, the Department of the Interior has frequently noted its concerns about the legitimacy of general fund revenue sharing. *See, e.g., supra* nn. 21 & 22 and accompanying text; *New Mexico v. Pueblo of Pojoaque*, 30 F. App'x 768, 768 (10th Cir. 2002) (order); *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1382 n.2 (10th Cir. 1997); *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 51

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objectively improper demands were made with an innocent intent.

(D.D.C. 1999). The Department of the Interior has approved compacts with general fund revenue sharing provisions agreed to by other California tribes, but has done so reluctantly, and only after the tribes themselves confirmed the desirability of the amendments.[26] Often, the Secretary simply permits compacts with revenue sharing provisions to go into effect "only to the extent they are consistent with IGRA," thus leaving open the precise question at issue. The State therefore could not reasonably have relied on the Department of the Interior's approval of certain other compacts as proof that its demands to Rincon were lawful. This is especially true since IGRA anticipates that, even if some tribes agree to a waiver of their rights not to be taxed by a state, such a waiver cannot be a basis for the State expecting the same from Rincon. *See Shoshone-Bannock*, 465 F.3d at 1101-02; S. Rep. No. 100-446, at 5, *as reprinted in* 1988 U.S.C.C.A.N. at 3075-76 (explaining that "it is the Committee's intention that to the extent tribal governments elect to relinquish rights in a tribal-State compact that they might have otherwise reserved, the relinquishment of such rights shall be

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[26] In approving the compact amendments referenced by the State, the Secretary noted that "the Department has sharply limited the circumstances under which Indian tribes can make direct payments to a State for purposes other than defraying the costs of regulating gaming activities," but agreed to approve the compacts at issue because the tribes themselves had confirmed that the exclusivity provision constituted "meaningful geographical exclusivity" and that the "amount of payment to the State [was] appropriate in light of the exclusivity right conferred."

specific to the tribe so making the election, and shall not be construed to extend to other tribes").

The State's demand for 10-15% of Rincon's net win, to be paid into the State's general fund, is simply an impermissible demand for the payment of a tax by the tribe. *See* § 2710(d)(3)(B)(iii); § 2710(d)(4). None of the State's arguments suffices to rebut the inference of bad faith such an improper demand creates.

In so holding, we are mindful that many states, and especially California, are currently writhing in the financial maw created by the clash of certain mandatory state expenditures at a time when state revenues have plummeted from historic levels. However, we are also keenly aware of our nation's too-frequent breach of its trust obligations to Native Americans when some of its politically and economically powerful citizens and states have lusted after what little the Native Americans have possessed. In developing IGRA, Congress anticipated that states might abuse their authority over compact negotiations to force tribes to accept burdens on their sovereignty in order to obtain gaming opportunities. *See, e.g.*, 134 Cong. Rec. S12643-01, at S12651 (1988) (statement of Sen. Evans); *see also* S. Rep. No. 100-446, at 33 (statement of Sen. John McCain), *reprinted in* 1988 U.S.C.C.A.N. at 3103. That is why the good faith requirement exists, and why IGRA condemns state taxation demands.

CONCLUSION

We AFFIRM the district court's finding that the State of California negotiated with Rincon in bad faith by conditioning its agreement to expand Rincon's class III gaming rights on Rincon's agreement to pay a percentage of its revenues to the State's general fund. The district court's order compelling the parties to reach a compact or submit their best offers to a mediator pursuant to § 2710(d)(7) is effective forthwith.

AFFIRMED.

BYBEE, Circuit Judge, dissenting:

In 1999, the Rincon San Luiseno Band of Mission Indians ("the Band") negotiated a compact with the State of California to operate a casino – known as Harrah's Rincon Hotel & Casino – in San Diego County. Under the terms of that compact, the Band was authorized to operate up to 1,600 Nevada-style gaming devices. The compact remains in effect until 2020. In 2003, the Band requested that California renegotiate the compact so that the Band could increase the number of devices from 1,600 to 2,500. Throughout an exchange of proposals, the State demanded that the Band contribute a percentage of its gaming revenues to the State's general fund. The negotiations failed, resulting in no increase in gaming devices for the Band and no revenues for the State. Unhappy with the course of the negotiations, the

Band brought suit under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, claiming that the State had negotiated in bad faith and requesting mandatory mediation.

In *In re Indian Gaming Related Cases ("Coyote Valley II")*, we held that when "a State offers meaningful concessions in return for fee demands. . . . it exercises its authority to negotiate, which IGRA clearly permits." 331 F.3d 1094, 1112 (9th Cir. 2003). Going well beyond anything we said in *Coyote Valley II*, the majority holds (1) the State's demand for "general fund revenue sharing [is] a bald demand for payment of a tax," Maj. Op. at 5896 (emphasis omitted); (2) "general fund revenue sharing . . . is . . . not an authorized subject of negotiation" under IGRA, *id.* at 5900; and therefore (3) the State's "demand for payment of a tax [is] . . . evidence of [the State's] bad faith," *id.* at 5896. The majority concludes that the State has negotiated in bad faith and orders the parties to amend their compact or submit to mediation.

I respectfully disagree with all of these propositions. First, we have long held that the power to tax is defined by the sovereign's power to *impose* the tax. California has exercised no such power here. The majority has confused California's hardball negotiations with the taxing power. California has not claimed any authority to tax the Band and, if these negotiations fail, the Band will not have added one penny to the State's coffers. Second, IGRA is silent on the particular question whether states and tribes

may include revenue sharing in their negotiations. But the Act provides that the parties "may include provisions relating to . . . any other subjects that are directly related to the operation of gaming activities," 25 U.S.C. § 2710(d)(3)(C)(vii), and we held in *Coyote Valley II* that the parties could negotiate over "fee demands." The majority now holds that such fee demands cannot include general revenue sharing *derived* from the operation of gaming activities, but are limited to fees spent on the regulation of gaming alone. This restriction takes from the State its primary incentive in negotiating gaming compacts with the tribes. Third, even if I thought California had imposed a tax on the Band, I do not believe the State has negotiated in bad faith. By its constitution, California has granted the tribes the exclusive right to offer Nevada-style gaming in the State. That structure puts the State and the Band into a bilateral monopoly situation in which each side has powerful economic incentives to negotiate at the margins. At the least, the State has offered the Band a more than fifty percent increase in the number of authorized gaming machines and a twenty-five year extension on its contract on terms comparable to other tribes with California compacts. The offered terms are well within the range of good faith negotiations. Of course, whether the Band should accept the State's offer is a very different question from whether the State has negotiated in bad faith. But absent the majority's intervention, both sides would have strong incentives to continue negotiations.

The impact of the majority's decision may not be readily apparent from its opinion, but the holding that California has negotiated in bad faith because its demand for general revenue sharing is a tax and not an authorized subject of negotiation does not just upset the apple cart – it derails the whole train. If the majority is correct, then there is nothing for California to do but to authorize whatever devices the Band wants. The Band wins. Everything.

Moreover, the damage is not confined to the Rincon Band. The revenue sharing provision that the majority strikes from the negotiations is found in fifteen other compacts that California has recently negotiated or renegotiated with tribes. All of those compacts were approved by the Secretary of the Interior. Those tribes now have a powerful argument that their compacts must be renegotiated (again) in light of the majority's decision. The damage, moreover, is not confined to our circuit. Every state that has negotiated a compact in recent years – including Connecticut, Florida, Michigan, New York, New Mexico, Oklahoma, and Wisconsin – has negotiated a similar revenue sharing provision, one that was also approved by the Secretary. The result is going to be chaos as tribe after tribe seeks to reopen negotiations concluded and duly approved. Nothing in IGRA compels our intervention in these negotiations.

I respectfully dissent.

I

Since the framing of the Constitution, Indian tribes have occupied a "unique legal posture . . . in relation to the federal government." WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 1 (5th ed. 2009). "[T]ribes are independent entities with inherent powers of self-government," but "the independence of the tribes is subject to exceptionally great powers of Congress," which "has a responsibility for the protection of the tribes and their properties. . . ." *Id.* at 1-2. The presence of fifty sovereign states complicates the relationship: "the power to deal with and regulate the tribes is wholly federal; the states are excluded unless Congress delegates power to them." *Id.* at 2. "[I]n assessing state regulation that does not involve taxation," the Supreme Court has taken a functional approach to try to "balance [] federal, state, and tribal interests." *Okla. Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458 (1995). However, state taxation of Indians or Indian tribes, where a "State attempts to levy a tax directly on an Indian tribe or its members inside Indian country," has produced, "instead of a balancing inquiry, a more categorical approach." *Id.* at 458 (quotation marks omitted).[1]

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[1] Like the unique relationship between Congress and the tribes, *see* U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian Tribes"), the special tax immunity enjoyed by Indian tribes has its roots in the Constitution, *see id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes

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The Supreme Court's approach to tribal sovereign immunity has evolved over time. As Chief Justice Marshall explained in *Worcester v. Georgia*, 31 U.S. 515 (1832), at the time of the framing there was a "universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States." *Id.* at 560.[2] By the late twentieth century, the Supreme Court had "reject[ed] . . . the broad assertion that the Federal Government has exclusive

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shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and *excluding Indians not taxed*, three fifths of all other Persons." (emphasis added)); *see also id.* amend. XIV, § 2 ("Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

[2] "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) (citing U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2 (additional citations omitted)).

jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise whether the enterprise is located on or off tribal land" in favor of "more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 147-48 (1973) (quotation marks omitted) (citing *McClanahan v. Ariz. State Tax Comm'n,* 411 U.S. 164 (1973)). But "[e]ven so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it," the Supreme Court found "no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation," holding that "such taxation [wa]s not permissible absent congressional consent." *Id.* at 148.

In short, "[a]bsent cession of jurisdiction or other federal statutes permitting it . . . a State is without power to tax reservation lands and reservation Indians." *Okla. Tax Comm'n,* 515 U.S. at 458 (quotation marks omitted). A tax levied directly on persons or property is known as a "direct tax," and "Indian tribes, like the Federal Government itself, are exempt from direct state taxation and . . . this exemption is lifted only when Congress has made its intent to do so unmistakably clear." *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 183 n.14 (1989) (quotation marks omitted).

II

Against this intricate backdrop of federal-state-tribal relations, tribal gaming emerged.

A

In the 1970s, bingo halls began to open on tribal land, often in derogation of state gambling laws. *See Coyote Valley II,* 331 F.3d at 1095; *Flynt v. Cal. Gambling Control Comm'n,* 129 Cal. Rptr. 2d 167, 172-73 (Ct. App. 2002). When states attempted to regulate or shut down tribal bingo halls, the tribes argued that their sovereign status immunized them from state gambling regulation. *Id.*; *see Barona Group of Capitan Grande Band of Mission Indians v. Duffy,* 694 F.2d 1185 (9th Cir. 1982); *Seminole Tribe v. Butterworth,* 658 F.2d 310, 312 (5th Cir. 1981), *cert. denied,* 455 U.S. 1020 (1982); *Oneida Tribe of Indians v. Wisconsin,* 518 F. Supp. 712 (W.D. Wis. 1981). Tribal bingo halls – and state attempts to regulate them – attracted national attention as the stakes and profit from these establishments skyrocketed. *See* James Coates, *U.S. fears big-money bingo will draw mob to Indian tribes,* CHI. TRIB.., Dec. 1, 1985, at 4; Howard LaFranchi, *States vs. Indian Bingo,* CHRISTIAN SCI. MONITORR, Feb. 24, 1986, at 3; Lenore Look, *Hearing to Air Complaints on Misuse of Tribes' Bingo Revenue,* L.A. TIMES, May 24, 1985, at A1; Iver Peterson, *Bingo That Doesn't Get Any Bigger,* N.Y. TIMES, Nov. 3, 1985, at E4.

California was right in the middle of the bingo battles: in the mid-1980s, the State attempted to enforce its gambling statutes against tribes operating bingo halls within its borders, and the tribes responded by filing suit in federal court, arguing that the State did not have regulatory jurisdiction over tribal lands. *Coyote Valley II,* 331 F.3d at 1095. In response, the State argued that Congress had expressly consented to the State's exercise of jurisdiction over tribal gaming activities in Public Law 83-280, which granted five states, including California, jurisdiction over criminal violations on tribal land. Pub. L. 83-280 (Aug. 15, 1953), *codified as amended at* 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326; *see Coyote Valley II,* 331 F.3d at 1095. In 1987, the Supreme Court ruled in favor of the tribes, holding that Public Law 83-280 did not expressly authorize state jurisdiction over activities on tribal land that were regulated, rather than wholly prohibited, under state law. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 210-12 (1987). Since "California regulate[d] rather than prohibit[ed] gambling in general and bingo in particular," the State's attempts to regulate tribal bingo were not authorized by Public Law 280, *id.* at 211, and "[s]tate regulation would impermissibly infringe on tribal government," *id.* at 222.

Legislation concerning tribal gaming had percolated in Congress for several years prior to *Cabazon,* but prior to the Court's decision in that case, it was unclear that congressional action was required to

allow state regulation of tribal gaming. The *Cabazon* decision answered this question in the affirmative, and the year after *Cabazon,* Congress passed the Indian Gaming Regulatory Act, Pub. L. 100-497 (Oct. 17, 1988), *codified at* 25 U.S.C. § 2701 *et. seq.*

B

In IGRA, Congress created a "cooperative federalis[t]" framework that "balance[d] the competing sovereign interests of the federal government, state governments and Indian tribes, by giving each a role in the regulatory scheme." *Coyote Valley II,* 331 F.3d at 1096 (quoting *Artichoke Joe's v. Norton,* 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002)). Recognizing that different types of gaming presented different regulatory burdens, IGRA outlined three classes of gaming and gave the respective sovereigns differing degrees of regulatory authority with respect to each gaming class. States were given very little regulatory authority over what Congress deemed class I and class II gaming – consisting of social games with prizes of minimal value, 25 U.S.C. § 2703(6), and bingo and certain non-banked card games, *id.* §§ 2703(7)(A)(B), respectively. States could not regulate class I gaming on tribal lands at all, *id.* § 2710(a)(1), and if a state allowed any class II gaming within its borders, it had to allow tribes to conduct such class II gaming on tribal lands subject only to tribal and federal regulation, *id.* §§ 2710(a)(2) and 2710(b)(1)(A)-(B). By contrast, class III gaming – consisting of banked card games such as blackjack

and baccarat, slot machines and other electronic gaming machines, and other Nevada-style gaming activities, *id.* §§ 2710(b)(7)(B) and 2710(b)(8) – was "subject to a greater degree of federal-state regulation than either class I or class II gaming." *Coyote Valley II,* 331 F.3d at 1097. In particular, IGRA allowed class III gaming activities on tribal lands only (1) "in a State that permits such gaming for any purpose by any person, organization, or entity," 25 U.S.C. § 2710(d)(1)(B), and (2) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under [25 U.S.C. § 2710(d)(3) *et seq.*] that is in effect," *id.* § 2710(d)(1)(C).

IGRA's compact requirement represented a unique approach to a unique situation. The prospect of class III gaming on tribal lands implicated important – and potentially divergent – interests of two sovereign parties, states and tribes. At the same time, however, Congress recognized that the respective interests of states and tribes with respect to class III gaming were neither identical nor mutually exclusive. Faced with this situation, Congress came up with a solution as old as the free market itself: allow states and tribes to *bargain* over the terms of their class III gaming relationship. As the Senate Report for IGRA explained:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of

> the mutual benefits that can flow to and from tribe [*sic*] and States. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

S. Rep. No. 100-446, at 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

At the same time, Congress recognized that it was not drafting IGRA against a blank legal slate. The Senate Report acknowledged the "long [ ] and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected

in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands." *Id.* at 5, *reprinted in* 1988 U.S.C.C.A.N. at 3075. "Consistent with these principles, the Committee . . . developed a framework for the regulation of gaming activities on Indian lands which provide[d] that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress w[ould] not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities." *Id.* at 6, *reprinted in* 1988 U.S.C.C.A.N. at 3075. "The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land [wa]s a tribal-State compact." *Id.* at 6, *reprinted in* 1988 U.S.C.C.A.N. at 3076.

In enacting IGRA, Congress was not only aware of the complicated legal framework governing state-tribal relations, but was legislating directly in response to a Supreme Court decision in this area-*Cabazon Band*. Recognizing the special consideration given to tribal immunity against *taxation* by the states absent congressional consent, Congress took care to ensure that IGRA's compact requirement did not "[lift] the Indians' exemption from state taxes." *Cabazon Band*, 480 U.S. at 215 n.17. Congress did

this in two ways: First, Congress explained that IGRA's compact provision did not constitute the "express congressional authorization" required under *Cabazon Band* and related precedents to abrogate tribal immunity to taxation, stating that "[e]xcept for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as *conferring* upon a State or any of its political subdivisions *authority to impose* any tax, fee, charge, or other assessment *upon an Indian tribe* . . . to engage in a class III activity." 25 U.S.C. § 2710(d)(4) (emphases added). Second, recognizing that states might demand that tribes abrogate their immunity to direct taxation as part of compact negotiations, Congress declared such a practice to be evidence of bad faith on behalf of the state making the demand. *See id.* § 2710(d) (7)(B)(iii)(II) (a court "shall consider any demand by the State for *direct taxation of the Indian tribe or of any Indian lands* as evidence that the State has not negotiated in good faith").

Providing a proper context to 25 U.S.C. §§ 2710(d)(4) and (d)(7)(B)(iii)(II) clarifies the congressional intent behind these provisions. These subsections are not concerned with States *negotiating* a "piece of the pie" with respect to class III gaming revenue: Congress expressly authorized State "assessment . . . of [class III gaming] activities," 25 U.S.C. § 2710(d)(3)(C)(iii), used deliberately narrow language in subsections (d)(4) and (d)(7)(B)(iii)(II), and, after recognizing that "[a] state's governmental

interests with respect to class III gaming on Indian lands include . . . impacts on the State's regulatory system, *including its economic interest in raising revenue for its citizens*," encouraged States and tribes "to conduct negotiations within the context of the mutual benefits that can flow to and from tribe [*sic*] and states." S. REP. NO. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (emphasis added). Rather, subsections (d)(4) and (d)(7)(B)(iii)(II) are concerned with the possibility that a State might use IGRA as pretext to *impose* taxes directly on an Indian tribe or its lands, where the tribe would otherwise be immune, *see* S. REP. NO. 100-446, at 14, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084 ("The Committee . . . view[s] the concession to any implicit tribal agreement to the application of State law as unique and does not consider such agreement to be precedent for any other incursion of State law onto Indian lands."), as well as the converse – using the threat of direct taxation to discriminate against tribes in favor of private gaming interests, *see id.* at 13 ("It is the Committee's intent that the compact requirement for class III gaming not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.").

In sum, §§ 2710(d)(4) and (d)(7)(B)(iii)(II) were motivated *not* by a concern that states might generate revenue from class III gaming conducted on Indian lands – indeed, the legislative history of IGRA

contemplates this very eventuality, S. Rep. No. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (recognizing a State's "economic interest in raising revenue for its citizens") – but by a concern that states might use IGRA and the promise of class III gaming to *otherwise impose taxes on Indian tribes and their land.*

The majority treats §§ 2710(d)(4) and (d)(7)(B)(iii)(II) as though these sections delegate to Article III judges the responsibility of conducting a broad, standardless review of the overall "fairness" of negotiated compacts, but this is simply not the case. As explained above, §§ 2710(d)(4) and (d)(7)(B)(iii)(II) were limited, carefully-worded responses to specific issues arising from the background of tribal-state relations under the Constitution. Moreover, IGRA already assigns to the Secretary of the Interior – the government official "charg[ed by Congress] . . . with broad responsibility for the welfare of Indian tribes," *Udall v. Littell,* 366 F.2d 668, 672 (D.C. Cir. 1966) (Burger, J.), and who owes "the Indians . . . [a] duty of care and protection," *Rainbow v. Young,* 161 F. 835, 838 (8th Cir. 1908) (Van Devanter, J.); *see* 25 U.S.C. § 2 (Secretary of the Interior, through the Commissioner of Indian Affairs, "shall . . . have the management of all Indian affairs and of all matters arising out of Indian relations"); 43 U.S.C. § 1457 (charging the Secretary of the Interior "with the supervision of public business relating to . . . Indians") – broad authority to approve or disapprove tribal-state compacts, and enumerates specific standards against

which a tribal-state compact is to be reviewed by the Secretary. *See* 25 U.S.C. § 2710(d)(3)(B) ("[A] Tribal-State compact . . . shall take effect only when notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary in the Federal Register."); *id.* § 2710(d)(8) *et seq.* ("The Secretary may disapprove a [Tribal-State] compact . . . only if such compact violates – (i) any provision of this chapter, (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or (iii) the trust obligations of the United States to Indians.").

C

As we explained in *Coyote Valley II*, "[t]he passage of IGRA did not end the fight over Indian gaming in California." 331 F.3d at 1098. After IGRA's passage, numerous California tribes sought to negotiate class III gaming compacts with the State. *Id.* Among the class III games the tribes sought to offer were banked card games and slot machine-like electronic gaming machines. However, at the time these particular games were not permitted under California law, even though California permitted other forms of class III gaming such as non-electronic keno and lotto. *Id.*; *see Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257-58 (9th Cir. 1994). During the Administration of Governor Pete Wilson, the State refused to negotiate with the tribes with respect to banked card games and slot machine-like gaming machines, arguing that under 25 U.S.C.

§ 2710(d)(1)(B) ("class III gaming shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity"), a state need only negotiate with tribes with respect to class III games and devices otherwise allowed under state law. *Coyote Valley II*, 331 F.3d at 1098. In *Rumsey*, we agreed with the State, holding that "IGRA does not require a state to negotiate over one form of Class III gaming simply because it has legalized another, albeit similar form of gaming. . . . In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." 64 F.3d at 1258.

For the next few years, numerous tribes continued to offer class III gaming activities that were categorically prohibited under California state law; in response, the Wilson administration refused to negotiate compacts covering class III games the State *did* permit. *Id.* at 1099. In 1998, a coalition of California tribes drafted a ballot proposition that would amend state law – but not the State Constitution – to require the State to enter into compacts with Indian tribes that allowed otherwise-illegal class III gaming activities including banked card games and slot machines. *Id.* at 1100. This ballot proposition passed by a wide margin, but was ruled unconstitutional by the California Supreme Court, as the California Constitution provided that the "Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey." CAL.

CONST. art. IV, § 19(e); *see Hotel Employees & Rest. Employees Int'l Union v. Davis*, 981 P.2d 990, 994 (Cal. 1999).

In early 1999 – while *Hotel Employees* was pending before the California Supreme Court, but prior to the court's decision in that case – the administration of newly-elected Governor Gray Davis reversed the Wilson Administration's non-negotiation policy and began compact negotiations with tribes regarding class III gaming that would include banked card games and slot machines. *Coyote Valley II*, 331 F.3d at 1102-03. After the *Hotel Employees* decision was filed in August 1999, the Davis Administration proposed an amendment to Article IV, Section 19 of the California Constitution that would exempt tribal gaming from the prohibition on Nevada-style casinos, subject to the requirement that class III gaming be conducted pursuant to a tribal-state compact; this proposed amendment was to be placed on the ballot in March 2000 as Proposition 1A. *Id.* at 1103 & n.11. Also in the late summer of 1999, the United States Department of Justice announced that it planned to proceed with enforcement actions against California tribes engaged in unauthorized class III gaming if those tribes did not enter into compacts with the State before October 13, 1999. *Id.* at 1103.

The Davis Administration and the tribes engaged in compact negotiations throughout August and September of 1999. The basic quid pro quo in these 1999 negotiations was as follows: First, the State offered the tribes the exclusive right – with this

exclusivity embodied in a constitutional amendment, *see* CAL. CONST. art. 4, § 19(f) – to conduct Nevada-style class III gaming, including house-banked slot machines and blackjack, *see* 1999 Tribal-State Gaming Compact ("1999 Compact") § 12.4, http://www.cgcc.ca.gov/enabling/tsc.pdf (last visited Apr. 6, 2010). In exchange, the tribes offered a variety of concessions including, as relevant here, (1) limits on the number of class III gaming devices a tribe could operate, *see id.* § 4.3; and (2) "Revenue Distribution," *see id.* § 5.0-5.3, under which a gaming tribe was required to remit to the State a percentage of its average net win from class III gaming devices in operation on September 1, 1999, to be deposited in a "Special Distribution Fund" ("SDF"). *Id.* § 5.1(a).[3] Under the 1999 Compact's "Revenue Distribution" provisions,

> [t]he State's share of the Gaming Device revenue [was to] be placed in the Special Distribution Fund, available for appropriation by the Legislature for the following purposes: (a) grants, including any administrative

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[3] The 1999 compact also provided for revenue sharing between gaming and non-gaming tribes through the creation of a "Revenue Sharing Trust Fund" ("RSTF"). *Id.* § 4.3.2 *et seq.* The RSTF provision required gaming tribes to pay, on a quarterly basis, a per-device annual fee into the RSTF for distribution to non-gaming tribes in California. *Id.* § 4.3.2.2(2). The RSTF provisions of the 1999 Compact were solely directed at gaming and non-gaming tribes – "[i]n no event [was] the State's General Fund [ ] obligated to make up any shortfall or pay any unpaid claims." *Id.* § 4.3.2.1(b).

> costs, for programs designed to address gambling addiction; (b) grants, including any administrative costs, for the support of state and local government agencies impacted by tribal government gaming; (c) compensation for regulatory costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the Compact; (d) payment of shortfalls that may occur in the Revenue Sharing Trust Fund; and (e) any other purposes specified by the Legislature.

Id. § 5.2. If a tribe failed to timely pay its required share of gaming device revenues to the State, the tribe would be charged interest "in addition to any other remedies the State m[ight] have," *id.* § 5.3(b); if "more than two quarterly contributions" by the tribe were overdue, the tribe would be prohibited from conducting class III gaming, *id.* § 5.3(e).

On September 10, 1999, 57 tribes, including the Band, signed letters of intent to enter the 1999 Compact. In March 2000, Proposition 1A was ratified by California voters. Two months later, the United States Secretary of the Interior approved the Tribal-State compacts entered into between the State and 60 tribes, including the Band. *Coyote Valley II,* 331 F.3d at 1107; *see* 65 Fed. Reg. 31189 (May 16, 2000). The Band currently operates its "Harrah's Rincon" casino pursuant to the 1999 Compact. Under this compact, which does not expire until 2020, the Band is authorized to operate 1600 gaming devices. Notably, because the Band operated fewer than 200 gaming

devices on September 1, 1999, it is not required to make – and never has made – revenue sharing payments to the SDF under its existing compact. *See* 1999 Compact § 5.1(a) ("The Tribe shall make contributions to the Special Distribution Fund . . . only with respect to the number of Gaming Devices operated by the Tribe on September 1, 1999.").

By 2003, California was awash in debt and faced a $38 billion dollar budget deficit. *See generally* Mark Simon, *Recall Election set for Oct. 7: Fiscal Crisis and voter resentment led to recall,* S.F. CHRON., July 25, 2003, at A1. As Governor Davis faced recall by the California voters, the State executed three new gaming compacts in August and September of 2003. *See* http://www.cgcc.ca.gov/compacts.asp (last visited Apr. 6, 2010). These compacts were nearly identical to the 1999 Compacts, although they differed in one important respect: instead of requiring the compacting tribe to remit a percentage of its gaming device net win to the Special Distribution Fund, these compacts called for the revenue sharing with the State's *general fund. See, e.g.,* La Posta Band of Mission Indians Tribal-State Gaming Compact § 4.3.1(a), http://www.cgcc.ca.gov/compacts/8132009/laposta.pdf (last visited Apr. 6, 2010) ("The La Posta Tribe may operate no more than 350 Gaming Devices. From and after the first day of operation of its first Gaming Facility, the La Posta Tribe shall pay five percent (5%) of its Net Win from the operation of Gaming Devices to the California Gambling Control Commission, or such other State entity as may be

designated by the Governor, for deposit into the General Fund."). All three compacts executed in 2003 calling for general fund revenue sharing were approved by the Department of the Interior. http://www.cgcc.ca.gov/compacts.asp (last visited Apr. 6, 2010).

In October 2003, Gray Davis was recalled, and Arnold Schwarzenegger was elected governor of California. The Schwarzenegger Administration has continued the late-term practice of the Davis Administration by negotiating general fund, rather than Special Distribution Fund, revenue sharing in new and amended tribal compacts. At present, fifteen Tribal-State compacts in California provide for general fund revenue sharing. *See* http://www.cgcc.ca.gov/Tribal/2009/GF%20Paying%20Tribes%20for%20Website%2003-04-09.pdf (last visited Apr. 6, 2010). Each of these compacts has been approved by the Secretary of the Interior.

III

When Congress drafted IGRA, it did so against a well-defined legal background prohibiting states from directly taxing Indian tribes and tribal lands without express congressional authorization. With this history expressly in mind, *see* S. REP. NO. 100-446, at 5, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075, Congress drafted two very specific provisions explaining (1) that IGRA's compact provisions, which allowed states to bargain with tribes over class III gaming regulation, did not authorize the states to impose a tax *on*

the tribe, 25 U.S.C. § 2710(d)(4); and (2) that in the context of compact negotiations, a state's demand for otherwise-prohibited direct taxation of a tribe or its lands would be evidence of bad faith, *id.* § 2710(d)(7)(b)(iii)(II). These provisions were carefully worded to respond to a specific problem – the possibility that IGRA's class III gaming provisions might be interpreted by states as an "express congressional authorization" for direct taxation or, relatedly, that states might use compact negotiations to demand abrogation of a tribe's immunity to direct taxation.

The majority steps into these stalled negotiations with an astonishing proposition: a demand for revenue sharing by the State is "simply an impermissible demand for the payment of a tax by the tribe" prohibited by § 2710(d)(4), Maj. Op. at 5915, and under § 2710(d)(7)(B)(iii)(II) "is evidence of the State's bad faith," *id.* at 5893. The majority orders the parties either to reach a compact or submit to mediation, but in either case, there is only one outcome: The Band wins. California loses.

In my view, the majority has failed to recognize the legal and historical differences between taxation and revenue sharing. A tax is imposed by the state and may be collected by the state, under penalty of law, over the objections of its citizens. Revenue sharing, by contrast, is typically negotiated by the parties and then enforced through the law of contract. If the parties fail to agree to revenue sharing in the first instance, neither side can unilaterally compel the other to share revenues; there is no contract. Here,

California has insisted that the Band share its gaming revenues as a condition to receiving authorization for additional gaming devices. To date, California has nothing to show for its negotiations and, under long-established principles, no power to compel the Band to pay it a percentage of its revenues. California and the Band are independent sovereigns; they may negotiate an agreement or not, but neither has the power to tax the other. Thus, California's insistence on revenue sharing may be "a hard line stance," Maj. Op. at 5909, but it is not a tax.

A

The majority has confounded two distinct and well-defined concepts: "taxation" and "revenue sharing." As described by the majority:

> Under § 2710(d)(7)(B)(iii)(II), a court *must* consider a "demand" for a tax to be made in bad faith. A tax is "a *charge*, usu[ally] *monetary*, imposed by the government on persons, *entities, transactions,* or property *to yield public revenue.*" Black's Law Dictionary 1594 (9th ed. 2009) (emphasis added). The State insisted that Rincon pay at least 10% of its net profits into the State's general fund. According to Cal. Govt. Code § 16300, "[t]he General Fund consists of money received into the treasury and not required by law to be credited to any other fund." No amount of semantic sophistry can undermine the obvious: a non-negotiable, mandatory payment of 10% of net profits into the State

> treasury for unrestricted use yields public revenue, and is a "tax."

Maj. Op. at 5892 (footnote omitted). Indeed, at every turn, the majority has equated revenue sharing with taxation. *See id.* at 5896 ("when the 'nature of the fees' is *general fund* revenue sharing – a bald demand for payment of a tax – the State faces a very difficult task to rebut the evidence of bad faith necessarily arising from that demand"); *id.* at 5915 ("The State's demand for 10-15% of Rincon's net win, to be paid into the State's general fund, is simply an impermissible demand for the payment of a tax by the tribe."). The majority fundamentally errs when it declares that "general fund revenue sharing [is] a bald demand for payment of a tax." Maj. Op. at 5896. In a definition quoted by the majority itself, Black's Law Dictionary defines a "tax" as "[a] charge, usu[ally] monetary, *imposed by the government* on persons, entities, transactions, or property to yield public revenue." BLACK'S LAW DICTIONARY 1594 (9th ed. 2009) (emphasis added). Webster's Third New International Dictionary and The Oxford English Dictionary feature nearly identical definitions. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2345 (1993) (defining "tax" as "a usu[ally] pecuniary charge *imposed* by legislative or other public authority upon persons or property for public purposes: a *forced* contribution of wealth to meet the public needs of a government" (emphases added)); XVII THE OXFORD ENGLISH DICTIONARY 677 (2d ed. 1989) (defining "tax" as "[a] compulsory contribution to the support of government,

levied on persons, property, income, commodities, transactions, etc., now at fixed rates, mostly proportional to the amount on which the contribution is *levied*" (emphases added)).[4] Whether the dictionary of record is Black's, Webster's 3d, or The Oxford English Dictionary, there are three components to the definition of "tax": (1) a monetary contribution; (2) *imposed by the government*; (3) to yield public revenue. The majority focuses on the first and third components – a monetary contribution yielding public revenue – but completely ignores the second component – the requirement that a charge be "*imposed*" or "*levied*" by the government before it can be deemed a "tax." *See* Maj. Op. at 5892-95. Yet, the fact that a monetary payment to the government is *imposed*, and not bargained-for, is *the* essential characteristic that defines a tax.

We have had occasion to consider what constitutes a tax, and have "applied this tax definition: (1) *An involuntary* pecuniary burden (2) *imposed* by the state legislature (3) for a public purpose (4) under the state's police or taxing power. *Our point in so refining the definition of a tax was to distinguish taxes from debts for voluntarily assumed obligations. . . .*"

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[4] "Levied" is simply a tax term of art for "imposed." *See* BLACK'S LAW DICTIONARY 991 (9th ed. 2009) (defining "levy" as "[t]o impose or assess (a fine or tax) by legal authority"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1301 (1993) (defining "levy" as "to impose or collect (as a tax or tribute) by legal process or by authority").

George v. Uninsured Employers Fund (In re George), 361 F.3d 1157, 1160 (9th Cir. 2006) (emphases added). As we explained in *In re Lorber Industries of California, Inc.*, "[i]n general, . . . charges can be classified as a tax only if they constitute 'a pecuniary burden laid upon individuals or property for the purpose of supporting the Government' or to support 'some special purpose authorized by it.' *Taxes are not equivalent to debts, which are voluntary obligations based on express or implied contracts. Taxes are levied without the consent or voluntary action of the taxpayer.*" 675 F.2d 1062, 1066 (9th Cir. 1982) (emphasis added) (quoting *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906)); *see also Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974).[5]

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[5] IGRA also recognized the distinction between a tax and a direct tax. *Compare* 25 U.S.C. § 2710(d)(4) (discussing the "impos[ition] of any tax, fee, charge, or other assessment upon an Indian tribe") *with* 25 U.S.C. § 2710(d)(7)(B)(iii)(II) (discussing "any demand by the State for direct taxation of the Indian tribe or of any Indian lands"). A direct tax is

> [a] tax that is imposed on property, as distinguished from a tax on a right or privilege. A direct tax is presumed to be borne by the person upon whom it is assessed, and not "passed on" to some other person.

BLACK'S LAW DICTIONARY 1595 (9th ed. 2009). *See also Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 588 (1895) (Field, J., concurring) ("Direct taxes, in a general and large sense, may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement."), *superseded by* U.S. CONST. amend. XVI; *Quarty v. United States*, 170 F.3d 961, 970 (9th Cir. 1999) ("In contrast to an excise or indirect tax, which is levied

(Continued on following page)

The majority, however, simply sidesteps the "imposition" requirement by slapping the conclusory labels "nonnegotiable" and "mandatory" on proposed revenue sharing payments that are neither. If the "payment of 10% of net profits into the State treasury for unrestricted use[,] yield[ing] public revenue" that the majority derides as a "non-negotiable, mandatory" tax, Maj. Op. at 5892, were either non-negotiable or mandatory, how is it that the State has not, to date, received one dime of general fund revenue from the Tribe? The answer, of course, is that the State's proposed 10% general fund revenue sharing payments are both negotiable (indeed, the 10% figure is just one of several revenue sharing proposals put forth by the State in negotiations with the Tribe) and subject to the Tribe's agreement in exchange for additional machines.

Perhaps the majority simply means that a fixed, agreed-to "payment . . . into the State treasure for unrestricted use yields public revenue, and is a tax," but this cannot be right, either. A purchaser of a bond – whether issued by a state, a municipality, or by the federal government – makes a monetary contribution that yields public revenue. But a bond is not a "tax."

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upon the use or transfer of property even though it might be measured by the property's value, a direct tax is levied upon the property itself.") (quotation marks and citations omitted); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 843 (3d ed. 2000) ("A direct tax is one imposed upon property as such, rather than on the performance of an act.").

Indeed, a bond is not a "tax" even if its proceeds go to a State's general fund. The reason for this is simple: even though a bond purchaser pays money to the government to support its functions, this payment is not "imposed" on the purchaser; rather, the bond purchaser pays money to support the government *in exchange for something of value*, a future interest stream. Under the majority's definition, another "obvious" tax would be simply *gifting* ten percent of one's net revenue to the federal government. Such a gift would, after all, be a monetary contribution yielding public revenue. But although helpful to the public fisc, this voluntary contribution would not be a "tax."

B

We must contrast "taxation" with "revenue sharing," in which two parties – whether private firms or sovereign entities *agree* to split a certain proportion of revenues from a specified source.

Revenue sharing is ubiquitous. Private entities engage in revenue sharing in areas as diverse as movie rentals, *see* Brooks Barnes, *Movie Studios See a Threat in Growth of Redbox*, N.Y. TIMES, Sept. 6, 2009, at B1 (Redbox and Paramount), sports arenas, *see* Ken Belson and David M. Halbfinger, *Possible Truce Between New Jersey Arenas Could Come at a Cost to Fans*, N.Y. TIMES, Dec. 12, 2009, at B16 (Izod Center and Prudential Center in northern New Jersey), newspapers and web portals, *see* Evan

Hessel, *Yahoo!'s Dangerous Newspaper Deal?*, FORBES ONLINE, June 22, 2009, http://www.forbes.com/2009/06/22/advertising-newspapers-internet-businessmedia-yahoo.html (last visited Apr. 6, 2010) (five newspapers and Yahoo!), and, of course, casinos, *see, e.g.*, Introduction to Slots and Video Gaming 76, International Game Technology, http://media.igt.com/Marketing/PromotionalLiterature/IntroductionToGaming.pdf (last visited Apr. 6, 2010) (slot machines and gaming venues).

Moreover, revenue sharing is hardly confined to the private realm. Since the 1880s, the federal government has contracted with private parties to operate "contract postal units" ("CPUs"), which are "postal facilities operated by private parties on private property pursuant to revenue-sharing contracts with the government." *Cooper v. United States Postal Serv.*, 577 F.3d 479, 485 (2d Cir. 2009). In exchange for the right to operate a postal facility, a CPU submits all of its revenues to the Postal Service, which then repays a portion of the revenue to the CPU. Like the federal government, state and local governments also enter into revenue-sharing contracts with private firms. For example, under a federal program administered by the U.S. Department of Transportation, a number of state and local governments contract with a private firm to collect and analyze traffic data. *See* Eric Lipton, *U.S. System for Tracking Traffic Flow is Faulted*, N.Y. TIMES, Dec. 13, 2009, at A22; *see also* Federal Highway Administration Report No. MH-2010-030, *Transportation Technology Innovation and*

Demonstration Program (Dec. 8, 2009), http://www.oig.dot.gov/sites/dot/files/TTID_12_8_2009.pdf (last visited Apr. 6, 2010) ("TTID Report"). The private firm is supposed to remit to these state and local governments a percentage of the money it makes from selling its traffic data, which Congress has described as revenue sharing, not a tax. *See* Pub. L. 105-178, § 5117(b)(3)(B)(iii) (June 9, 1998); *see generally* TTID Report at 6-8.

Federal, state and local governments have long entered into revenue sharing agreements with each other. "A form of general revenue sharing was actually in operation as early as 1836[,] when nearly $28 million was deposited with State governments. In [the twentieth] century, congressional attempts to secure Federal tax sharing date back to 1949[,] when a Member of Congress from Kansas introduced a bill to transfer to State treasuries 1 percent of Federal individual and corporate income taxes raised within the State." *Council of and for the Blind of Del. County Valley, Inc. v. Regan*, 709 F.2d 1521, 1523 n.2 (D.C. Cir. 1983) (en banc) (quotation marks, ellipses, brackets, and citation omitted); *see also* 43 U.S.C. § 1608 *et seq.* (requiring the United States and the State of Alaska to pay to Native Alaskans two percent of annual gross revenue from the disposition of minerals removed from that state; Congress titled this program "revenue sharing").

Perhaps the most prominent example of broad-based intergovernmental revenue sharing was the State and Local Fiscal Assistance Act of 1972, Pub. L.

92-512, 86 Stat. 919, more commonly known as the Revenue Sharing Act. *See generally* President Richard Nixon, Statement About the General Revenue Sharing Bill (Oct. 20, 1972) (transcript available at http://www.presidency.ucsb.edu/ws/index.php?pid=3636 (last visited Apr. 6, 2010)). Under the Revenue Sharing Act, Congress "g[ave] legal effect to a concept which had been proposed intermittently for more than 20 years – that the federal government make general revenue grants to state and local governments with no strings attached." *Council of and for the Blind of Del. County Valley, Inc.*, 709 F.2d at 1523. For just over a decade (the program was allowed to expire in 1983), the federal government paid billions of dollars to state and local government *general funds* with "no strings . . . attached." *See* S. REP. NO. 92-1050, at 3876 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3874, 3876; *Goolsby v. Blumenthal*, 590 F.2d 1369, 1371 (5th Cir. 1979) (en banc).[6]

As these examples demonstrate, there is a long history of revenue sharing in the United States. It has taken two forms. First, there is vertical revenue sharing, where one government decides to share its revenues with another (smaller) governmental entity.

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[6] States have their own forms of intergovernmental revenue sharing. For example, California has decided to share its cigarette tax revenues with its counties and cities, but not with the Indian tribes within its borders. CAL. REV. & TAX § 30462; *see Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 800 F.2d 1446, 1450 (9th Cir. 1986).

In this form of revenue sharing, the smaller entity has no continuing demand on the revenues; it appears that the decision by the larger entity to engage in revenue sharing is one of largesse and can be amended at any time. The second form is horizontal or negotiated revenue sharing, where two sovereigns, two private entities, or a sovereign and a private entity negotiate revenue sharing as a matter of contract. Horizontal revenue sharing is a voluntary matter, to be agreed upon by the parties as a part of their overall negotiations. No one has ever thought that horizontal revenue sharing is a form of taxation.

C

The ultimate question, then, is whether California's demand for a share of the Band's gaming revenues is direct taxation or a form of revenue sharing. The answer is critical to the resolution of this case. In my view, the answer is not a difficult one.

IGRA requires that tribes and states "enter[] into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). Congress's chosen words here – "'enter," "compact," and "governing" – are the language of treaties and other sovereign-to-sovereign agreements. Since the states are barred from entering into "any Treaty, Alliance, or Confederation," U.S. CONST. art. I, § 10, cl. 1, Congress chose an appropriate word: "compact" – the very definition of which implies negotiation between equal parties. *See* BLACK'S LAW DICTIONARY 318 (9th ed.

2009) (defining "compact" as "[a]n agreement or covenant between two or more parties, esp. between governments or states"). Notably, the tribal-state compacts in IGRA, which derive their existence from a congressional enactment and must be approved by the Secretary of the Interior, resemble very closely the interstate compacts described by the Constitution's Compact Clause. *See* U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . ."). An interstate compact, even if it involves the exchange of funds, is not interstate *taxation,* but "[a] voluntary agreement between states enacted into law in the participating states upon federal congressional approval." BLACK'S LAW DICTIONARY 318 (9th ed. 2009). Critically, "[i]nterstate compacts, like treaties, are presumed to be the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties." *New Jersey v. Delaware,* 552 U.S. 597, 615-16 (2008) (quotation marks omitted).

As a sovereign (a state) negotiating a compact with another sovereign (an Indian tribe), California has no "authority to impose any tax" on the Band. 25 U.S.C. § 2710(d)(4). It may "demand" that the Band share a portion of its gaming revenues with the State, but "demands" are part and parcel of negotiations; as in negotiations between private parties, the State has

no authority to impose such a requirement unilaterally. This case is the best proof of this principle. California can demand general revenue sharing until it is hoarse, but it will not get revenue from the Band until the Band agrees. The State's strategy is aggressive, and aggression in negotiations comes with the risk that the deal will fall through. California is running that risk. For all of its posturing and demands, California has, to date, not one penny to show for its negotiations with the Band.[7]

In the tribal-state compacts California has negotiated since 2003, it has secured revenue sharing from other tribes. It has not *imposed* revenue sharing, but rather obtained it through sovereign-to-sovereign negotiations. When "two equal sovereigns," S. REP. NO. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083; *Coyote Valley II*, 331 F.3d at

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[7] I do not doubt for a moment that a tribe would regard a demand for revenue sharing with the same disdain it would the imposition of a tax. That is, a tribe may equate revenue sharing and taxation because they have the same *economic* effect on its welfare. But the *legal* difference between the two is significant, for reasons I have described above.

A simple example illustrates my point about the difference between an economic and a legal effect. Whether my landlord raises my rent by $100 a month or the government increases my income taxes by $100 a month, the economic impact on me is the same: I am out an additional $100 a month. But there are legal and political consequences where government imposes additional taxes that are not found in the rent increase. No one would mistake the rent increase for a tax, even though my checkbook can't tell the difference between the two.

1112, negotiate a percentage of gross revenue to be paid from one party to the other in exchange for other concessions, this is *revenue sharing* – even if the revenue is not earmarked for a specific fund. Revenue sharing is not a "tax," and it is certainly not "direct taxation of [a] tribe or . . . [its] lands." 25 U.S.C. § 2710(d)(7)(B)(iii)(II). The majority errs when it holds otherwise.

IV

Although much of the majority opinion is devoted to holding that California's revenue sharing proposal is a tax, the majority stops short of conceding that all revenue sharing provisions are prohibited. *See* Maj. Op. at 5906 ("[W]e do not hold that no future revenue sharing is permissible. . . ."). The majority qualifies its concern so long as two conditions are satisfied: First, that the State has offered "meaningful concessions," *Coyote Valley II*, 331 F.3d at 1111, and second, that the purposes for which the State intends to use the revenue are directly related to the operation of gaming activities, *see* 25 U.S.C. § 2710(d)(3)(C) ("Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to . . . (vii) any other subjects that are directly related to the operation of gaming activities."). In my view, the majority has misread both requirements.

A

In *Coyote Valley II,* we held that where California "offered meaningful concessions in return for its demands, it did not 'impose' [a putative tax] within the meaning of § 2710(d)(4)." 331 F.3d at 1111. We expressed concern that, if a state demanded revenue from a tribe without offering anything in return, then the revenue demand might constitute an "impose[d] tax, fee, charge, or other assessment," which IGRA's compact provisions did not authorize. 25 U.S.C. § 2710(d)(4). However, we did not actually decide whether such a demand would constitute the imposition of a tax, fee, or charge, because we found that California had offered concessions in the negotiating process:

> We do not hold that the State could have, *without offering anything in return,* taken the position that it would conclude a Tribal-State compact with Coyote Valley only if the tribe agreed to pay into the RSTF. Where, as here, however, a State offers meaningful concessions in return for fee demands, it does not exercise "authority to impose" anything. Instead, it exercises its authority to negotiate, which IGRA clearly permits.

Coyote Valley II, 331 F.3d at 1112. Similarly, in *Shoshone-Bannock Tribes,* we observed that § 2710(d)(4) was not a bar where "the parties *negotiated* a bargain permitting such payments in return for meaningful concessions from the state (such as a conferred monopoly or other benefits)." 465 F.3d at 1101. We

reasoned that "[a]lthough the state did not have *authority* to exact such payments, it could bargain to receive them in exchange for a quid pro quo conferred in the compact." *Id.*

The majority goes one step beyond *Coyote Valley II* and *Shoshone-Bannock Tribes.* Unfortunately, it goes in the wrong direction. Instead of allowing the parties to work out their differences through the negotiating process, it finds that the State did not offer "meaningful concessions" to the Band because it "disagree[s] that the State makes 'meaningful concessions' whenever it offers a bundle of rights more valuable than the status quo." Maj. Op. at 5912. The majority's statement mangles the phrase "meaningful concessions": it is hard to think what concession could be *more* meaningful than "a bundle of rights more valuable than the status quo."

The majority's novel conception of "meaningful concessions" finds no support in IGRA and conflicts with our explanation of "meaningful concessions" in *Coyote Valley II,* the Department of the Interior's reading of the Act, and centuries of contracts jurisprudence as well.

A "meaningful concession" is something conceded or granted that is real to at least one of the parties and not merely nominal or illusory. Notably, this is *exactly* how we described the requisite "concessions" under 25 U.S.C. § 2710(d)(4) in *Coyote Valley II*: "If [ ] offered concessions by a State are *real,* § 2710(d)(4) does not categorically prohibit fee demands." 331 F.3d

at 1112 (emphasis added). Simply put, "meaningful" implies "non-negligible," but no more.

The Department of Interior has also interpreted "meaningful concessions" along the same line. As described in an IGRA review letter by the Principal Deputy Assistant Secretary of the Interior:

> As our previous compact decision letters have stated, in order to determine whether revenue sharing violates 25 U.S.C. § 2710(d)(4), we first look to whether the State has offered meaningful concessions. We have traditionally viewed this concept as one where the State concedes *something* that it was otherwise not required to negotiate that provides a benefit to the Tribe, i.e. exclusivity or some other benefit.

Absentee Shawnee Tribe Oklahoma, Dept. of Interior IGRA Rev. Ltr. (Dec. 17, 2004), http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Absentee%20Shawnee%20Tribe%20of%20Oklahoma/absenteeshawnee121704.pdf (last visited Apr. 6, 2010) (emphasis added). DOI's interpretation of "meaningful concession[ ]" as "the State conced[ing] *something* that it was otherwise not required to negotiate" accords with the phrase's plain meaning and also falls neatly within black-letter contract law.

This understanding of "meaningful concession[ ]" dovetails nicely with one of the most venerable concepts in the common law – the doctrine of consideration. Under the common law of contracts, a court will not weigh the adequacy, in the sense of *market*

equivalence, of bargained-for consideration, but will determine whether putative consideration is nominal or a "sham." *See* 4 JOSEPH M. PERILLO ET AL., CORBIN ON CONTRACTS §§ 5.14, 5.17 (2d ed. 1995). Thus, a court will make a threshold inquiry to make sure that what is exchanged is not a "pretense," but will not assign its own subjective valuation to each side's respective concessions. In the words of a leading treatise, this approach to contract law is the very cornerstone of market exchange:

> We have a free market, under our common law, for the reason that the courts have left it free. They do not require that one person shall pay as much as others may be willing to pay, or that one person shall receive as little as others may be willing to receive for a like article. The contracting parties make their own contracts, agree upon their own exchanges, and fix their own values.

4 CORBIN ON CONTRACTS § 5.14.

In light of our own explanation of the phrase in *Coyote Valley II,* DOI's understanding of the phrase, and black letter contract law, there can be little doubt that when we used the phrase "meaningful concessions" in *Coyote Valley II,* we were describing exactly what the majority rejects: a State makes "meaningful concessions" whenever it offers a bundle of rights more valuable than the status quo. Courts have not traditionally tipped the scales of negotiations between two well-represented parties, and there is no warrant in IGRA or in *Coyote Valley II* to do so here.

Coyote Valley II states the applicable test as plainly as words will allow: "If . . . offered concessions by a State are *real,* § 2710(d)(4) does not categorically prohibit fee demands." 331 F.3d at 1112 (emphasis added).

B

Equally infirm is the majority's restricted reading of § 2710(d)(3)(C)(vii) and its conception of what a state may do with the revenue it has bargained for. In the end analysis, I think that the majority has turned *Coyote Valley II* on its head. The majority now holds that "[w]hether revenue sharing is an authorized negotiation topic . . . depends on the *use* to which the revenue will be put, not on the mere fact that the revenue derives from gaming activities." Maj. Op. at 5899. As described by the majority, the RSTF and SDF addressed "fair distribution of gaming opportunities and compensation for the negative externalities caused by gaming" and did not "'put tribal money into the pocket of the State.'" *Id.* at 5899-90 (quoting *Coyote Valley II,* 331 F.3d at 1113). But whereas in *Coyote Valley II* we simply held that the RSTF and SDF were permissible subjects of negotiation, the majority now holds that the RSTF and SDF represented the *outer limits* of permissible negotiation. Thus, the majority answers the question we reserved in *Coyote Valley II* and holds that "general fund revenue sharing is not 'directly related to the operation of gaming activities' and is thus not an authorized subject of negotiation." Maj. Op. at 5900 (quoting

25 U.S.C. § 2710(d)(3)(C)(vii)); *see also id.* at 5910 ("[G]eneral fund revenue sharing is not a state public policy interest directly related to gaming and is not an authorized negotiation topic. . . .").

I have two responses to the majority's analysis. First, I do not think that § 2710(d)(3)(C) is so limited. The listing of subjects that are appropriate for State-Tribe negotiations is permissive: the compact "*may* include provisions relating to" the items on the list. 25 U.S.C. § 2710(d)(3)(C) (emphasis added). In *United States v. Redman*, 35 F.3d 437 (9th Cir. 1994), we interpreted the phrases "may consider," "shall consider," and "should consider" in successive versions of the Sentencing Guidelines. *Id.* at 440-41. The 1989 amendment to § 5G1.3(c) of the Guidelines provided that the court "may consider" a reasonable incremental penalty to be a sentence for the instant offense, while the 1991 amendment to this section used the phrase "shall consider," and the 1992 amendment to the same section used the phrase "should consider." *Id.* We noted that "Webster defines the word 'may' as 'have permission to[,]' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1396 (1986) . . . [,] '[s]hall' is defined as being 'used in laws, regulations and directives to express what is mandatory[,]' *id.* at 2085[, and] '[s]hould' is used to express what is 'probable or expected[,]' *id.* at 2104," and reasoned:

> The meaning of the current "should consider" language in § 5G1.3 can be discerned by reference to the earlier iterations of the Guideline. Under the 1989 ["may consider"]

> amendment, *courts had complete discretion to employ the commentary methodology or not* when deciding on a reasonable incremental penalty. The 1991 ["shall consider"] amendment stripped courts of all discretion in the matter. . . . The "should consider" language in the current version falls somewhere between the "may consider" language in the 1989 amendment and the "shall impose" mandate of the 1991 version.

Redman, 35 F.3d at 440-441 (citations omitted). In short, we have interpreted the word "may" as Webster's Third New International Dictionary defines it: as a *grant of permission* rather than an prescriptive limitation. Section 2710(d)(3)(C), which enumerates a number of subjects which a Tribal-State compact "*may* include provisions relating to," identifies these interests as permitted subjects of negotiation, but neither explicitly nor implicitly restricts negotiations to these interests.[8] *See* generally COHEN'S HANDBOOK

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[8] The majority opines that "[t]he language and structure of § 2710(d)(3)(C) suggest it is exhaustive." Maj. Op. at 5890 n.9. But the majority's analysis on this point runs contrary to our longstanding interpretation of the compact requirement's closest legal analog: the "good faith bargaining" requirement in the National Labor Relations Act. *See In re Indian Gaming Related Cases* ("*Coyote Valley I*"), 147 F. Supp. 2d 1011, 1020-21 (N.D. Cal. 2001) ("Like IGRA, the NLRA imposes a duty to bargain in good faith, but does not expressly define 'good faith.' . . . The Court does not intend to import federal case law interpreting the NLRA wholesale into its interpretation of the IGRA. . . . However, the Court considers the NLRA case law for guidance in

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OF FEDERAL INDIAN LAW 873 (2005 ed.) ("Tribes and states may include a wide variety of subjects in the gaming compacts. . . . More than 200 tribal-state compacts have been approved, and they are often subject to amendments, as well as new negotiations if they have sunset provisions. It is thus impossible to generalize about the content of provisions . . . ").

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interpreting a standard undefined by the IGRA."), *aff'd*, *Coyote Valley II*, 331 F.3d 1094.

Under section 158 of the NLRA, 29 U.S.C. § 158 *et seq.*, there is an "[o]bligation to bargain collectively," defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." *Id.* § 158(d). The list "wages, hours, and other terms and conditions of employment" could easily be read to comprise the entirety of *permissible* subjects that could be collectively bargained; i.e., the list could be read as "exhaustive," an interpretation the majority believes is compelled by the language and structure of § 2710(d)(3)(C) in IGRA. Like the subjects in 25 U.S.C. § 2710(d)(3)(C), the subjects in 29 U.S.C. § 158(d) include a broad final clause – in IGRA, "any other subjects that are directly related to the operation of gaming activities," and in the NLRA, "other terms and conditions of employment." Yet 29 U.S.C. § 158(d) has *not* been interpreted to establish an "exhaustive" list of subjects that may be negotiated in collective bargaining. Instead, we have interpreted § 158(d) as setting out "[m]andatory subjects – 'wages, hours, and other terms and conditions of employment' – [that] must be bargained collectively in good faith," *Retlaw Broad. Co. v. NLRB*, 172 F.3d 660, 665 (9th Cir. 1999), but which are not the *only* subjects subject to collective bargaining. Rather, "all other subjects are permissive subjects," which "deal with a wide range of matters deemed to fall outside the framework of mandatory terms." *Id.* (quotation marks omitted).

Even if the list outlined in § 2710(d)(3)(C)(i)-(vii) were exclusive – a proposition that runs contrary to the dictionary definition of "may," our interpretation of the term "may" as used in other congressional enactments, and our longstanding interpretation of § 158(d) of the NLRA – the State's revenue-sharing proposal would still be an authorized subject of negotiation, as it falls within § 2710(d)(3)(C)(vii), a catch-all provision authorizing negotiation of "any other subjects that are directly related to the operation of gaming activities." The majority reads this clause very restrictively, explaining that "[w]hether revenue sharing is an authorized negotiation topic under § 2710(d)(3)(C)(vii) [ ] depends on the *use* to which the revenue will be put, not on the mere fact that the revenue derives from gaming activities," Maj. Op. at 5899; *see also id.* at 5890 n.9, but its reading of § 2710(d)(3)(c)(vii) cannot be reconciled with our decision in *Coyote Valley II*.

In *Coyote Valley II*, we rejected the tribe's request "to read § 2710(d)(3)(C)(vii) narrowly and to hold that it does not encompass a provision like the RSTF." 331 F.3d at 111. Instead, "we h[e]ld that § 2710(d)(3)(C)(vii) authorize[d] the RSTF provision. . . ." 331 F.3d at 1111. Critically, the RSTF did not *use* revenue for gaming purposes. Rather, the RSTF distributed revenue to *non-gaming* tribes, who could use it however they saw fit; the RSTF was effectively a contribution to the non-gaming tribes' general revenue funds. The RSTF certainly used revenue for the benefit of Indian tribes, but it did *not*

use revenue for any *purpose* directly related to gaming. Our express holding in *Coyote Valley II* that "the RSTF provision clearly falls within [§ 2710(d)(3)(C)(vii)'s] scope," *id.*, is irreconcilable with the "use" restriction relied on by the majority.

The majority also runs afoul of *Coyote Valley II* when it declares that "what compels a limited reading [of § 2710(d)(3)(C)(vii)] is the canon of construction obligating us to construe a statute abrogating tribal rights narrowly and most favorably towards tribal interests." Maj. Op. at 5890 n.9. This canon, which "we regard [ ] as a mere guideline and not a substantive law," *Williams v. Babbitt,* 115 F.3d 657, 663 n.5 (9th Cir. 1997) (quotation marks omitted), only applies to "ambiguous provisions," *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). Yet in *Coyote Valley II,* we held that § 2710(d)(3)(C)(vii) "is not ambiguous and that the RSTF provision clearly falls within its scope," rejecting the tribe's argument that the RSTF provision was unauthorized under § 2710(d)(3)(C)(vii) based on the principle that "we should interpret any ambiguities on these issues in a matter that will be most favorable to tribal interests." 331 F.3d at 1111 (quotation marks omitted). Since we have expressly held that § 2710(d)(3)(C)(vii) is not ambiguous, the canon that ambiguities in statutes should be construed in favor of Indian tribes is

inapplicable. Once again, the majority is simply wrong on this point.[9]

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[9] To the extent the majority relies on this canon beyond its interpretation of § 2710(d)(3)(C)(vii) (to which we have already held the canon inapplicable), even this reliance is flawed. As we explained in *Coyote Valley II* and as the Supreme Court made clear in *Seminole Tribe,* IGRA involved *two* countervailing sovereign interests – states and Indian tribes – and it granted authority to *each. See Coyote Valley II,* 331 F.3d at 1096 ("IGRA . . . seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme."); *Seminole Tribe,* 517 U.S. at 58 ("[T]he Act grants the States a power that they would not otherwise have. . . ."). Although states have not traditionally had the power to regulate Indian tribes, states *have* traditionally had the power to regulate the scope of gambling within their territorial borders. As the Supreme Court has explained, "Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States. . . . This plain statement rule is . . . an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft,* 501 U.S. 452, 461 (1991) (quotation marks and internal citation omitted); *see also, e.g., Owasso Indep. Sch. Dist. No. I-011 v. Falvo,* 534 U.S. 426, 435-36 (2002) (rejecting a proposed interpretation of the ambiguous term "education records" in the Family Education Rights and Privacy Act where it was "doubt[ful] Congress meant to intervene in this drastic fashion with traditional state functions. . . . The Congress is not likely to have mandated this result, and we do not interpret the statute to require it."). Thus, to the extent that IGRA's provisions other than § 2710(d)(3)(C)(vii) are ambiguous, this is a "dueling canons" situation in which it is far from clear that the federalism canon should be shoved aside in favor of the tribal sovereignty canon. *See, e.g., Fla. Dept. of Revenue v. Piccadilly Cafeterias, Inc.,* 128 S. Ct. 2326, 2338 (2008) ("We agree with Florida that the federalism canon . . . obliges us to construe [a statutory exemption from state taxation] narrowly.").

Instead of rigidly imposing a gaming-only restriction on how negotiated revenue sharing may be used, § 2710(d)(3)(C)(vii) simply "prevent[s] compacts from being used as a subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming." *Coyote Valley II,* 331 F.3d at 1111. As in *Coyote Valley II,* "the State has not sought to engage in such a subterfuge" here. *Id.* Tribes such as the Band are asking for something from the State – additional gaming devices – to which they are not entitled under their current compacts. California has requested a share of the revenues *generated by those devices.* This seems pretty "related to the operation of gaming activities" to me. If, for example, California had asked the Band to open a water park on tribal lands located elsewhere in the state or to make a donation to the booster club at UCLA, we might have an issue.

The majority and I would probably agree that it would have been better if Congress had made it explicit in IGRA whether general revenue sharing could be a part of compact negotiations or not. But it didn't, and that failure has generated public controversy, litigation, and a cottage industry in law review articles.[10] Unfortunately, the only consensus among

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[10] *See, e.g.,* Katie Eidson, Note, *Will States Continue to Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order to Expand Indian Gaming?,* 29 AM. INDIAN L. REV. 319, 325-39 (2004); Courtney J.A. DaCosta, Note, *When "Turnabout" Is Not "Fair Play": Tribal Immunity under the Indian Gaming Regulatory Act,* 97 GEO. L.J.

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academics appears to be that Congress should clarify the issue and address revenue sharing head-on.[11]

515, 542-546 (2009); Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the "Economic Benefits" Test,* 54 S.D. L. REV. 419, 431-39 (2009); Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming,* 44 HARV. J. ON LEGIS. 39, 57-95 (2007); Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing under the Indian Gaming Regulatory Act,* 91 GEO. L.J. 451, 453-74 (2003); Matthew Murphy, Note, *Betting the Rancheria: Environmental Protections as Bargaining Chips under the Indian Gaming Regulatory Act,* 36 B.C. ENVTL. AFF. L. REV. 171, 181-84 (2009); Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming,* 90 MARQ. L. REV.. 971, 985-87 (2007); Kathryn R.L. Rand and Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform,* 13 VA. J. SOC. POL'Y & L. 396, 462-65 (2006); Joshua L. Sohn, *The Double-Edged Sword of Indian Gaming,* 42 TULSA L. REV. 139, 150-56 (2006).

[11] Much of the academic literature disapproves of tribal-state revenue sharing as a normative matter, but the legal consensus – particularly among professorial, as opposed to student, authors – appears to be that IGRA is simply silent on the issue of revenue sharing. Commentators have suggested that Congress clarify the issue. *See* Fletcher, 44 HARV. J. ON LEGIS.. at 94 ("argu[ing] that a legislative package to ratify and authorize revenue sharing . . . [would] alleviate the major problems in IGRA . . . "); Rand and Light, 13 VA. J. SOC. POL'Y & L. at 462 (recommending that Congress "[a]mend IGRA to create a revenue-sharing structure that encourages cooperative tribal-state policymaking while ensuring tribes remain the primary beneficiaries of Indian gaming by creating a presumptive rebuttable cap"); *see also Wisconsin v. Ho-Chunk Nation,* 512 F.3d 921, 932 (7th Cir. 2008) ("The validity, under the IGRA, of revenue-sharing agreements in tribal-state compacts has been a

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States and tribes, however, do appear to have reached a consensus, at least in practice:

> Although it is clear that states may not tax gaming activities, tribes and states have devised approaches that allow some form of revenue sharing with the states. . . . The Secretary of the Interior has approved revenue sharing arrangements on the ground that those payments are not taxes, but exchanges of cash for significant economic value conferred by the exclusive or substantially exclusive right to conduct gaming in the state. . . . Despite generating high-level publicity and debate, revenue sharing provides states and tribes with the means to consummate compacts that both sides can legitimately claim will provide substantial economic benefits to their constituents.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 874. Perhaps the best evidence for the practice is the fact that, after twenty years of experience with IGRA,

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contentious issue. . . . [T]he legitimacy of these revenue-sharing provisions is far from a settled issue.").

every compact negotiated in recent years-including compacts in Connecticut,[12] Florida,[13] Michigan,[14] New

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[12] *See* Mashantucket Pequot Tribe Memorandum of Understanding (Apr. 30, 1993) (providing for revenue sharing of twenty-five percent of gross operating revenues from electronic gaming machines), http://www.ct.gov/dosr/lib/dosr/Memorandum_Of_Understanding_Foxwoods.pdf (last visited Apr. 6, 2010); Mohegan Tribe Memorandum of Understanding (May 17, 1994), http://www.ct.gov/dosr/lib/dosr/Memorandum_Of_Understanding_Mohegan.pdf (last visited Apr. 6, 2010) (same); *see also* http://www.ct.gov/dosr/lib/dosr/tribal_state_compact_foxwoods.pdf (last visited Apr. 6, 2010) (stating that assessment pursuant to 25 U.S.C. § 2710(d)(3)(C)(iii) is to be paid into State's general fund); http://www.ct.gov/dosr/lib/dosr/tribal_state_compact_mohegan.pdf (last visited Apr. 6, 2010) (same).

[13] *See* Seminole Tribe of Florida Compact Pt. XI and Exh. A (Nov. 14, 2007), http://www.flgov.com/pdfs/2007114compact-exhibita.pdf (last visited Apr. 6, 2010) (providing for revenue sharing of between ten and twenty-five percent of the tribe's net win, and noting that "[t]he appropriation of any Payments received by the State pursuant to this Compact lies within the exclusive prerogative of the Legislature").

[14] *See, e.g.*, Match-E-Be-Nash-She-Wish Band of Pattawatomi Indians of Michigan Compact § 15-17 (May 9, 2007), http://www.michigan.gov/documents/mgcb/Gunlake_Compact_276443_7.pdf (last visited Apr. 6, 2010) (providing for eight to twelve percent of net win to be paid into Michigan Strategic Fund, a state economic development fund in no way related to gaming or its effects, providing for additional two percent revenue sharing between the tribe and affected local governments, and explaining that "[b]y entering into this agreement neither the Tribe nor the State of Michigan intend to create any new authority, nor to expand or diminish any existing authority, on the part of the State of Michigan to impose taxes upon the Tribe, its members, or any person or entity doing business with the Tribe pursuant to this Compact").

York,[15] New Mexico,[16] Oklahoma,[17] Wisconsin,[18] and, of course, California – has included general revenue sharing. Equally significant, the Secretary of the Interior has sanctioned these compacts.[19] Many of the

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[15] *See* Seneca Nation of Indians Compact § 12(b) (April 12, 2002), http://www.ncai.org/ncai/resource/agreements/ny_gaming-seneca_nation-4-12-2002.pdf (last visited Apr. 6, 2010) (providing for general fund revenue sharing of eighteen to twenty-five percent, depending on year).

[16] *See* Tribal-State Class III Gaming Compact § 11 (2007), http://www.nmgcb.org/tribal/2007%20compact.pdf (last visited Apr. 6, 2010) (providing for payment by tribe of a percentage of gaming machine net win "to the State Treasurer for deposit into the General Fund of the State").

[17] *See* Oklahoma Tribal-State Gaming Act Model Tribal Gaming Compact, 3A OKLA. STAT. § 281 Part 11 (outlining percentage of adjusted gross gaming revenues that are to be paid to the State by tribes, and providing: "Payments of such fees shall be made to the Treasurer of the State of Oklahoma. Nothing herein shall require the allocation of such fees to particular state purposes, including, but not limited to, the actual costs of performing the state's regulatory responsibilities hereunder.").

[18] *See, e.g.*, Amendments to the Menominee Indian Tribe of Wisconsin Compact § 42 (Apr. 2003), http://www.doa.state.wi.us/docview.asp?docid=2147 (last visited Apr. 6, 2010) (amending tribal-state compact to provide for general fund, rather than earmarked, revenue sharing).

[19] The majority has erred to the extent it implies that the Eleventh Amendment prevents the Secretary from disapproving compacts he considers illegal under IGRA. *See* Maj. Op. at 5885-86 n.8. Under IGRA, the Secretary may disapprove any compact he determines "violates – (i) *any provision of this Act*, (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or (iii) the trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B)(i)-(iii) (emphasis added). The Secretary, who is "charg[ed by Congress]

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. . . with broad responsibility for the welfare of Indian tribes," *Udall*, 366 F.2d at 672, and owes "the Indians . . . [a] duty of care and protection," *Rainbow*, 161 F. at 838, is charged by IGRA with conducting an independent review of the legality of compacts, irrespective of whether the tribes can challenge those compacts in federal court. *Cf. Knight v. United States Land Ass'n*, 142 U.S. 161 (1891) ("The Secretary [of the Interior] is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out. . . .").

Moreover, as the majority itself explains, where the Secretary has had concerns about a compact but nonetheless felt the compact should not be disapproved, he has voiced these concerns explicitly. *See Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 51 (D.D.C. 1999). Yet the Secretary has approved, or deemed approved *without any cautionary language*, dozens of compacts or compact amendments providing for general revenue sharing, including all fifteen compacts calling for general revenue sharing by California tribes. *See, e.g.*, 69 Fed. Reg. 76,004 (Dec. 20, 2004) (approving compact between California and Coyote Valley Band of Pomo Indians); 72 Fed Reg. 36,717 (July 5, 2007) (approving compacts between State of New Mexico and the Pueblo of Isleta, Pueblo of Nambe, Pueblo of Picuris, Pueblo of San Felipe, Pueblo of Sandia, Pueblo of Santa Ana, Pueblo of Tesuque, Pueblo of Taos, Pueblo of Santa Clara and Ohkay Owingeh); 72 Fed. Reg. 58,333 (Oct. 15, 2007) (approving compact between New Mexico and Pueblo of Laguna); 72 Fed. Reg. 71,939-40 (Dec. 19, 2007) (deeming approved, without cautionary language, compacts between California and Morongo Band of Mission Indians, Pechanga Band of Luiseno Indians, and Agua Caliente Band of Cahuilla Indians); 73 Fed. Reg. 1229 (Jan. 7, 2008) (deeming approved compact between Florida and Seminole Tribe of Florida); 73 Fed. Reg. 3480 (Jan. 18, 2008) (approving compact between California and San Manuel Band of Mission Indians); 74 Fed. Reg. 18397 (Apr. 22, 2009) (deeming approved, without cautionary language, compact between Michigan and Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan).

payments under these compacts are substantial. For example, Florida receives approximately $100 million annually in general fund revenue sharing from the Seminole Tribe, Courtney J.A. DaCosta, Note, *When "Turnabout" Is Not "Fair Play": Tribal Immunity under the Indian Gaming Regulatory Act,* 97 GEO. L.J. 515, 543 (2009), while New Mexico's general fund received nearly $63 million in revenue sharing payments between October 1, 2008 and September 30, 2009, *see* http://www.nmgcb.org/tribal/revsharing.html. In Connecticut, home to the nation's largest tribal casino and two of the largest casinos in the entire world, the Mashantucket Pequot and Mohegan tribes pay twenty-five percent of gross revenue from electronic gaming machines to the State of Connecticut's general fund. *See supra* n.9. In 2008, the last full calendar year for which revenue information is available, Connecticut received $411,410,973 in general fund revenue under the Mashantucket Pequot and Mohegan gaming compacts, http://www.ct.gov/dosr/lib/dosr/General_Fund_Revenues_All_Games.pdf (last visited Apr. 6, 2010), about half of which came from Connecticut's slot machine revenue sharing agreement with the tribes, http://www.ct.gov/dosr/lib/dosr/Fosltweb.pdf (last visited Apr. 6, 2010). In the years 2003-07, Connecticut received $387 million, $403 million, $418 million, $428 million, and $430 million, respectively in general fund revenue from its tribal casinos. The Secretary of the Interior, charged with seeing to the general welfare of the tribes, has approved the revenue sharing provisions of every

one these compacts, taking the "view [that] revenue-sharing arrangements are lawful so long as the state offers the tribe separate consideration in exchange for a cut of the tribe's gaming revenues." Dacosta, 97 GEO. L.J. at 543-44; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 876 ("The Secretary of the Interior . . . has not expressed concern over how the revenues are used by a state, so long as the exclusivity provides 'substantial economic benefit' to the tribe.").

V

From its flawed premises – that negotiated revenue sharing is a direct tax and that any state demands for revenue sharing must be accompanied by substantial concessions and a promise to use the revenues for gaming-related purposes only – the majority proceeds to consider whether the State has failed to negotiate with the Band in good faith. The majority concludes that it has. Among the majority's concerns with the State's demands, one stands above all others: in the majority's view, "the financial benefit to Rincon from the amendments proposed would be negligible: Rincon stood to gain only about $2 million in additional revenues compared to the State's expected $38 million." Maj. Op. at 5908; *see also id.* at 5903 ("We [] find particularly persuasive the fact that the revenue sharing demanded in this case would result in $38 million in additional net revenue to the State compared to $2 million for the tribe."); *id.* at 5885.

"IGRA's legislative history . . . makes clear that the good faith inquiry is nuanced and fact-specific, and is not amenable to bright-line rules." *Coyote Valley II*, 331 F.3d at 1113. "The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc." S. REP. NO. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084. Even if the State's demand for revenue sharing could be construed as a demand for direct taxation, I think the majority's concerns are misplaced and the State has not negotiated in bad faith. The State has taken a hardline position, one that the Band does not like, but that does not make it a *bad faith* negotiating position. *See, e.g., Wis. Elec. Power Co. v. Union Pac. R.R. Co.*, 557 F.3d 504, 510 (7th Cir. 2009) ("A duty of good faith does not mean that a party vested with a clear right is obligated to exercise that right to its own detriment for the purpose of benefiting another party to the contract."); *NLRB. v. Truitt Mfg. Co.*, 351 U.S. 149, 154-55 (Frankfurter, J., concurring in part and dissenting in part) ("'Good faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness. . . . The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination.").

For reasons I explain below, the way in which California authorized Indian gaming creates a bilateral monopoly that gives both parties an economic incentive to take hardline positions – positions that are perfectly consistent with the obligation to negotiate in good faith. I then explain why the State's demands are reasonable and its concessions meaningful. Because I do not think it is our place to interfere in these negotiations absent bad faith, I would let the parties work it out (or not).

A

In California, unlike other states, Indian tribes' territorial exclusivity is enshrined in the state Constitution. California prohibits all entities other than Indian tribes from operating Nevada-style gaming within its borders. Thus, when the State negotiates a class III gaming compact with a tribe, it is negotiating with the only entity legally authorized to offer such gaming in California. The State, for its part, has the sole right to authorize the operation of additional gaming machines by the tribes. The negotiation of a new compact between the State and the Band therefore presents a classic bilateral monopoly, where "two [parties] . . . bargain over some thing of value only with each other [and] neither can rely on competition to determine the price of the thing." *In re Hoskins*, 102 F.3d 311, 315 (7th Cir. 1996), *abrogated on other grounds by Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997); *see generally* BLACK'S LAW DICTIONARY 1098 (9th ed. 2009) (defining "bilateral monopoly" as

"[a] hypothetical market condition in which there is only one buyer and one seller, resulting in transactional delays because either party can hold out for a better deal without fearing that the other party will turn to a third party").

The Band enjoys such a monopoly position. Although it can only offer class III gaming pursuant to a Tribal-State compact, *see* CAL. CONST. art. 4, § 19(f), and can only increase its number of gaming devices pursuant to a new or amended compact, at the same time, the Band is the only entity that can offer class III gaming in its immediate territory under the California Constitution. By law, the State has monopoly power over the authorization of gaming machines; equally by law, the Band is the only entity that can be authorized to offer these machines.

Here, the "thing of value" over which the State and the Band are bargaining is the revenue from additional class III gaming devices at Harrah's Rincon. According to the State's economic expert, 900 new devices would bring in an additional $40 million in gaming revenue. The "price" being negotiated here is the proportion of new gaming revenue the Band will pay to the State in exchange for these additional devices and an extension of its compact. What economists call the "bargaining range" in a bilateral monopoly can be ascertained by determining the "corner solutions" – i.e., the situations in which one party is an unmitigated winner and the other an unmitigated loser. *See generally Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 278 (7th Cir. 1992) (noting that in

such situations "[n]egotiations would be unlikely to break down completely, given such a bargaining range, but they might well be protracted and costly"). Here, the corner solutions are as follows. At one extreme, the State offers the Band some number of additional gaming devices, but the Band pays 100 percent of new revenues to the State. The State is an unmitigated winner; the Band an unmitigated loser. Assuming the Band realizes $40 million in revenues from 900 new machines, this would result in $40 million for the State, and $0 for the Band. At the other extreme, the State offers the Band some number of additional gaming devices, but the Band pays *no more to the State than it does under the current compact*; the State gains nothing at all from this transaction, while the Band gains 100% of new revenue. The Band is an unmitigated winner; the State an unmitigated loser. Assuming $40 million in revenues from 900 new machines, this would result in $40 million for the Band, and $0 for the State.

These corner solutions determine the bargaining range in negotiations between the State and the Band for a new compact allowing the Band to operate additional class III gaming devices. Assuming $40 million in new revenues, the bargaining range is anywhere between: (1) $0.01 for the State and $39,999,999 for the Band; and (2) $39,999,999.99 for the State and $0.01 for the Band. Given the vagaries and transaction costs involved in bilateral monopoly, "[t]here is no way to predict where in the bargaining range the bargain w[ill] be struck," *In re Hoskins*, 102

F.3d at 316, but "*at any price between those figures . . . both parties would be better off*," *Walgreen Co.*, 966 F.2d at 276 (emphasis added). The reason for this "any price" principle is because here, there exists another possible "corner solution" besides the two described above: the Band refuses to share revenues and the State refuses to authorize new gaming devices, and *neither party gains any additional revenue.* Under the circumstances of the bilateral monopoly at issue here, any compact offer falling within the "bargaining range" – which includes the State's offers in this case – cannot be seen as made in "bad faith," since the Band would be offered real net gains in the millions of dollars annually under even the most parsimonious State offer.

Despite the raw economics of the situation, the majority holds that "a state may not take a 'hard line' position in IGRA negotiations when it results in a 'take it or leave it offer' to the tribe. . . ." Maj. Op. at 5909. What the majority has failed to appreciate is that the State and the Band are in precisely the same position. If the State wants additional revenue (or any additional intangible benefits from Harrah's Rincon's expanded operations), and the Band refuses to budge, the State must take or leave the Band's offer. The State has no other options available to it.

B

Even negotiating within the framework of a bilateral monopoly, the State's offer is not one-sided.

The State argues that it has offered three "meaningful concessions" to the Band: (1) territorial exclusivity, (2) an extension of the compact term, and (3) authorization for additional devices. Although I agree with the majority that the State's offer of territorial exclusivity is not a meaningful concession in light of Proposition 1A, there is no question that the State has offered a "real" concession to the Band by offering to extend the compact term and to increase the allowed number of class III gaming devices the Band can operate. I will address each in turn.

1

As an initial matter, I agree with the majority that the State's "offer" of territorial exclusivity is not a "meaningful concession" within the meaning of *Coyote Valley II*. *See* Maj. Op. at 5906-09. The California Constitution already guarantees tribal exclusivity against private gaming interests, and under the Band's current compact, as modified by Addendum A, the Band retains the right to terminate its compact or to continue under the compact with reduced revenue sharing requirements "[i]n the event the exclusive right of Indian tribes to operate Gaming Devices in California is abrogated. . . ." The "revised and expanded" exclusivity provision provides no meaningful protection beyond that afforded by the Band's current compact, and thus cannot serve as consideration for an amended compact. In other words, it is not a "real" concession, *see Coyote Valley II*, 331 F.3d at 1112, but an illusory one.

The State's other offered concessions, however, are unquestionably "real." First, the State's offer to extend the expiration date of the Band's compact to 2045 is quite meaningful. The Band's current compact, which expires on December 31, 2020 (or June 30, 2022 if a party requests negotiations for an extension), contains no right to automatic renewal. Under the Supreme Court's decision in *Seminole Tribe v. Florida,* 517 U.S. 44 (1996), a tribe cannot sue a state in federal court under 25 U.S.C. § 2710(d)(7) *et seq.* absent an express waiver of sovereign immunity by the state. The current compact between California and the Band contains a limited waiver from the State of its sovereign immunity. *See* 1999 Compact § 9.4 *et seq.,* http://www.cgcc.ca.gov/enabling/tsc.pdf (last visited Apr. 6, 2010). Once the compact expires, *the State will not longer be subject to suit by the Band* to enforce any of IGRA's requirements, including its good faith negotiation requirement. *See Seminole Tribe,* 517 U.S. at 72. Thus, by offering to extend the Band's compact until 2045, the State is offering to subject itself to IGRA's requirements with respect to negotiations with the Band for an additional twenty-five years. To my mind, the State's promise to extend the compact and waive its sovereign immunity for another twenty-five years is a substantial concession. Without it, the Band has a casino resort until 2020, but not beyond.

Even more "meaningful" is the State's offer to increase the number of gaming devices the Band may operate from 1600 to 2500 devices. Under the California Constitution, "[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey" – i.e., establishments offering Class III gaming. CAL. CONST. art. 4, § 19(e). California's Constitution provides a *limited* exception to this prohibition with respect to federally recognized Indian tribes on Indian lands: "the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law," and "slot machines, lottery games, and banking and percentage card games are . . . permitted to be conducted and operated on tribal lands *subject to those compacts*." *Id.* art. 4, § 19(f) (emphasis added). Thus, although the California Constitution allows Indian tribes to operate slot machines, banked card games, and similar activities, it does not provide blanket authorization for their operation; the Constitution explicitly requires that casino-style gaming be operated "subject to [a] compact [ ]" between the Governor and the Tribe.

Critically, since the very inception of Indian gaming compacts in California, the State has negotiated, *in gaming compacts,* limits on the scope of class

III gaming, including the number of gaming devices that a tribe can operate. *See* 1999 Model Tribal-State Gaming Compact § 4.3.1 ("The Tribe may operate no more Gaming Devices than the larger of the following: (a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or (b) Three hundred fifty (350) Gaming Devices."), http://www.cgcc.ca.gov/enabling/tsc.pdf (last visited Apr. 6, 2010).[20] As the majority itself concedes, *see* Maj. Op. at 5909-10 & n.20, device licensing is a proper subject for negotiation under IGRA, *see* 25 U.S.C. § 2710(d)(3)(C)(vi). Since tribal exclusivity is already written into the California Constitution, the number of authorized gaming devices is, at this point, *the single most important issue* subject to negotiation in Tribal-State compacts in California.[21]

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[20] The Band operates its casino subject to a compact effectively identical to this 1999 Model Compact. *See* http://www.cgcc.ca.gov/Tribal/1999%20Compact%20Tribes%20Gaming%20and%20Non-Gaming%20list.pdf (last visited Apr. 6, 2010).

[21] The majority relies on a DOI letter to the Forest County Potawatomi Community of Wisconsin for the proposition that negotiations over the number of gaming devices cannot serve as adequate consideration for revenue sharing. Maj. Op. at 5910-11. Yet this letter, and the views expressed therein, are irrelevant here. In the letter, the Assistant Secretary of Indian Affairs explains that "[w]e have not, nor are we disposed to, authorize revenue-sharing payments in exchange for compact terms *that are routinely negotiated by the parties as part of the regulation of gaming activities,* such as duration, number of gaming devices, hour of operation, and wager limits." Maj. Op. at 5911 (emphasis added). However, in Wisconsin, unlike in California, the number of gaming devices a tribe may operate has *not* been limited by

(Continued on following page)

When the State offered to allow the Band to operate a greater number of machines, it was not only offering a "real" or "meaningful" concession, it was offering a concession on the single most "meaningful" subject over which it retained control. Under our decision in *Coyote Valley II*, this means that the State did not violate § 2710(d)(4) in connection with the proposed compact. *See* 331 F.3d at 1112. Since "offered concessions by [the] State [we]re real, § 2710(d)(4) d[id] not categorically prohibit [the] fee demands" in this case. *Id.*

C

Next, I wish to address why, in light of these concessions, the disparity between the revenue sharing demanded by the State and the profits to be realized by the Band is not as great as the majority

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compact, but has been subject only to reporting requirements and tribal self-regulation. *See, e.g.*, Bad River Band of the Lake Superior Tribe of Chippewa Indians Gaming Compact § XV(C)(3), http://www.doa.state.wi.us/docview.asp?docid=2127 (last visited Apr. 6, 2010); Amendments to the Bad River Band of the Lake Superior Tribe of Chippewa Indians Gaming Compact § 7, http://www.doa.state.wi.us/docview.asp?docid=2129 (last visited Apr. 6, 2010). Since a Wisconsin tribe could already increase the number of devices it operated without a compact amendment, the DOI opined that an offer to increase the number of allowed devices was not a meaningful concession by the State of Wisconsin. This is in stark contrast to California, where the number of allowed gaming devices has *always* been set by compact, and therefore is not now, and *never has been*, "routinely negotiated by the parties as part of the regulation of gaming activities."

portrays it to be and why it is not, therefore, evidence of bad faith negotiations. When the Band entered into its original compact in 1999, it was operating less than two hundred gaming devices. As a consequence, the Band was exempt from making revenue payments into the SDF. In fact, the Band does not now make (and never has made) any SDF payments under its current compact.[22] In stark contrast to every tribe that has negotiated, or renegotiated, a compact with California since 1999, the Band shares no revenue with the State. But this will likely change in 2020. Without a doubt, the Band's sweetheart deal with respect to revenue sharing will not last past its current compact: every compact negotiated in California since 1999 includes either SDF or general fund revenue sharing.[23] Thus, any compact negotiation between the Band and the State – whether it be for an amended compact today or for a wholly new compact a decade from now – will inevitably include a State demand for revenue sharing of some sort; to do otherwise would put the Band in a preferred position *vis-a-vis* the other tribes in California.

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[22] *See* List of SDF Paying Tribes, http://www.cgcc.ca.gov/Tribal/2008/SDF%20Paying%20Tribes%20for%20Website%202008.pdf (enumerating twenty-one tribes making SDF payments under their current compacts (last visited Apr. 6, 2010), of which the Band is not one).

[23] *See generally* Tribal-State Gaming Compacts, http://www.cgcc.ca.gov/compacts.asp (last visited Apr. 6, 2010).

In *Coyote Valley II,* we approved of the SDF revenue sharing provisions in compacts negotiated by the Davis Administration. We recognized that "the contributions tribes must make to the SDF are significant," but concluded that, in light of the State's concession of exclusivity, it was not "inimical to the purpose or design of IGRA for the State . . . to ask for a reasonable share of tribal gaming revenues." 331 F.3d at 1114-15. Here, the majority declares that the State's revenue sharing proposals in the negotiations with the Band differ so vastly from the "reasonable share of tribal revenues" paid under the SDF provision by the *Coyote Valley II* tribes that the State's bad faith is conclusively established:

> [T]he calculations presented by the State's *own* expert reveal that the financial benefit to Rincon from the amendments proposed would be negligible: Rincon stood to gain only about $2 million in additional revenues compared to the State's expected $38 million. Thus, in stark contrast to *Coyote Valley II,* the relative value of the demand versus the concession here strongly suggests the State was improperly using its authority over compact negotiations to impose, rather than negotiate for, a fee. Under IGRA and *Coyote Valley II,* that is bad faith.

Maj. Op. at 5908-09 (citation omitted).

The majority's analysis on this point could not diverge any more sharply from the reality of what we deemed to be a "reasonable share of tribal gaming

revenues" in *Coyote Valley II*. 331 F.3d at 1115. Under the SDF formula – and using the same economic model used to calculate the majority's $38 million-$2 million split – the Band would be required to pay $35.8 million to the state, and would keep approximately $4 million in net revenues.[24] There is simply no logical basis for simultaneously deeming a formula leading to a $36 million-$4 million split in net revenues "a reasonable share," and a formula leading to a $38 million-$2 million split in net revenues so substantively and objectively unreasonable as to constitute "bad faith." I do not see how the majority's analysis can be reconciled with *Coyote Valley II*.

Furthermore, although the Band is not required to make SDF payments under its current compact,[25]

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[24] These calculations are based on the State's expert testimony referred to in the majority opinion. Using a net win of $369 per day per machine for 2,500 machines gives the following payments to the State:

(1) Under the State's 10 percent/15 percent revenue sharing proposal deemed to be "bad faith" by the majority:

(0.10 2005 Gross Revenues of $197 million) + (0.15 $369/day 365 days 900 machines) = $37.9 million

(2) Under the SDF structure we deemed to be "a reasonable share of tribal revenues" in *Coyote Valley II*:

$369/day 365 days (0.07 300 machines + 0.10 500 machines + 0.13 1500 machines) = $35.8 million

[25] Tribes that did not operate 200 or more gaming devices as of September 1, 1999 were not required to contribute to the SDF under the 1999 Compact. The Band was not operating 200 or more devices as of September 1, 1999 and is therefore exempt from SDF payments under its current compact.

once the Band's current compact expires in 2020, the State will certainly insist on revenue sharing at a level at least equal to the SDF level required of other tribes and already approved by this court in *Coyote Valley II*. Thus, come 2020, the Band will likely be faced with the following choice: negotiate a new compact with the State that will include at least SDF-level revenue sharing, or cease class III gaming. The State's offer here, however, not only extends the Band's compact until 2045, but allows the Band to make *more money* now and over the next decade leading up to 2020. The State has offered a ten-year revenue stream of $2 million annual payments *to which the Band would not otherwise be entitled*; after ten years has passed, the Band will be able to conduct class III gaming under a revenue sharing agreement similar to that which the State would no doubt insist upon in negotiating a new compact. In sheer monetary terms, the State is offering concessions with a net present value of approximately $19.5 million.[26] If this is not "meaningful," I'm not sure what is.

Nothing that I have said here is an endorsement of the State's terms. I don't know whether the State's offer is a "good" one or not. The point is not whether

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[26] This net present value calculation assumes the federal funds discount rate remains at a near-record low 0.50. If the rate were to rise to a more normal level-averaging, say, 2.25 over the next decade – the net present value of the bargained – for income stream would decrease to $17.7 million, still a "meaningful" sum.

the State's offer is "good" or "bad." We are not the Band's advisors or guardians ad litem. The Band has been well represented in this proceeding, and I am sure it has been well advised throughout these negotiations as well. All we have to decide is whether the State has negotiated in good faith, not whether it has made the Band a good offer. I would hold that these terms have been offered in good faith.

D

Finally, there is abundant real-world evidence that the State's offers were not made in bad faith: specifically, numerous tribes in California (none of whom are barred by the Eleventh Amendment from suing California in federal court) have *agreed* to compact terms effectively identical to those offered by the State. Fifteen tribes currently contribute gaming revenue to the State's General Fund, *see* http://www.cgcc.ca.gov/Tribal/2009/GF%20Paying%20Tribes%20for%20Website%2003-04-09.pdf (last visited Apr. 6, 2010), all pursuant to compacts negotiated or renegotiated since 2003, http://www.cgcc.ca.gov/compacts.asp (last visited Apr. 6, 2010). Notably, eleven of the tribes that currently contribute class III gaming revenues to the State's general fund are 1999 Compact tribes (like the Band) who now contribute to the State's general fund pursuant to *renegotiated* compacts that allowed these tribes to operate additional devices in exchange for general fund revenue sharing. *Id.*; *see, e.g.*, Shingle Springs Band of Miwok Indians Compact § 4.3.1, http://www.cgcc.ca.gov/

compacts/Shingle%20Springs%20Compact.pdf (last visited Apr. 6, 2010) (amending 1999 Compact to increase allowed devices to 5,000 and providing for general fund revenue sharing of 20% for first $200 million in net win and 25% for net win exceeding $200 million). And whatever questions these compacts may have raised for the Secretary of the Interior, the Secretary ultimately accepted the negotiations and declined to disapprove all of the compacts and their amendments.

In other words, the State has regularly proposed, the tribes have regularly accepted, and the Secretary has regularly approved contract terms similar to those proposed by the State in this case. Although it is true, as the majority posits, that the fact that numerous tribes have agreed to general fund revenue sharing would not insulate such revenue sharing from IGRA's substantive requirements, it defies logic to hold, as does the majority, that a contract proposal readily agreed to by a dozen other tribes was so outrageously one-sided that it could only have been made in "bad faith." *See* Maj. Op. at 5892, 5914-15; *see also Wis. Elec. Power Co.*, 557 F.3d at 510 ("the duty of good faith does not require your putting one of your customers ahead of the others"). Yet this is what 25 U.S.C. § 2710(d)(7)(B)(iii) requires for court intervention. The provision does not prohibit "hard bargaining" within the negotiating range of the Tribal-State compact bilateral monopoly, but is instead concerned solely with "bad faith" based on an "inquiry [that] is nuanced and fact-specific, and is not

amenable to bright-line rules," *Coyote Valley II*, 331 F.3d at 1113, and which takes into account "the previous relationship of the tribe and State," S. Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084. The negotiations at issue here, even though inconclusive, have been well within those parameters.

As we explained in *Coyote Valley II*:

> Congress did not intend to allow States to invoke their economic interests as a justification for excluding Indian tribes from class III gaming; nor did Congress intend to permit States to use the compact requirement as a justification for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes. By the same token, however, Congress also did not intend to require that States ignore their economic interests when engaged in compact negotiations. *See* [S. REP. NO. 100-446, at 2, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071] ("An objective inherent in any government regulatory scheme is to achieve a fair balancing of competitive economic interests."). Indeed, § 2710(d)(7)(B)(iii)(I) expressly provides that we may take into account the "financial integrity" of the State and "adverse economic impacts on the State's existing gaming activities" when deciding whether the State has acted in bad faith, and IGRA's legislative history explains that a State's governmental interests with respect to class III gaming on Indian lands include its

> economic interest in raising revenue for its citizens.

331 F.3d at 1115 (quotation marks, brackets, ellipses, and internal citation omitted).

VI

The majority's legal errors carry grave – and widespread – practical repercussions. The majority's decision will call into question Tribal-State gaming compacts not just in cash-strapped California, where no fewer than fifteen Tribal-State compacts provide for general fund revenue sharing, *see* http://www.cgcc.ca.gov/Tribal/2009/GF%20Paying%20Tribes%20for%20Website%2003-04-09.pdf (last visited Apr. 6, 2010), but throughout the country.[27] The Second Circuit has

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[27] The majority is correct to point out that although California has waived its sovereign immunity to suits under IGRA, not all states have done so. But the majority is premature to conclude that tribes in those states could not challenge the legality of compact negotiations. *See* Maj. Op. at 5885-86 n.8. After the *Seminole Tribe* decision, the Secretary promulgated 25 C.F.R. Part 291, which "establish[es] procedures that the Secretary will use to promulgate rules for the conduct of Class III Indian gaming when: (a) A State and an Indian tribe are unable to voluntarily agree to a compact and; (b) The State has asserted its immunity from suit brought by an Indian tribe under 25 U.S.C. § 2710(d)(7)(B)." 25 C.F.R. § 291.1. In 2007, a divided Fifth Circuit panel held that IGRA did not authorize 25 C.F.R. Part 291. *See Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 32 (2008). It appears that the Department of the Interior has refused to acquiesce in the Fifth Circuit's decision, *see Alabama v. United States*, 630 F. Supp. 2d 1320, 1332 (S.D. Ala. 2008), indicating that the invalidity of the

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never addressed a legal challenge to the Connecticut compacts governing the behemoth Foxwoods and Mohegan Sun Casinos, but the majority decision here will inevitably spur such challenges in Connecticut and in New York. The Sixth, Tenth, and Eleventh Circuits have yet to consider the validity of general revenue sharing under IGRA, but it can reasonably be expected that district court clerks in Michigan, New Mexico, Oklahoma, and Florida will be docketing legal challenges sometime soon. These lawsuits – based on a misreading of IGRA by the majority in the first federal appellate decision to squarely address the legality of negotiated general fund revenue sharing – will eat up State, tribal, and federal resources and will unsettle dozens of mutually beneficial revenue-sharing provisions that have fed both tribal coffers and revenue-hungry state treasuries.

I respectfully dissent.

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regulations is hardly a settled issue outside the Fifth Circuit. Notably, no other circuit court – including the Second, Sixth, Tenth, and Eleventh Circuits (home to Connecticut, Michigan, New Mexico and Oklahoma, and Florida, respectively) – has held the Part 291 regulations to be invalid.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, a/k/a RINCON SAN LUISENO BAND OF MISSION INDIANS a/k/a RINCON BAND OF LUISENO INDIANS, Plaintiff, vs. ARNOLD SCHWARZENEGGER, Governor of California; WILLIAM LOCKYER, Attorney General of California; STATE OF CALIFORNIA, Defendant.	CASE NO. 04cv1151 WMc **ORDER: DENYING IN PART AND GRANTING IN PART CROSS MOTIONS FOR SUMMARY JUDGMENT; [DOC. NOS. 173 and 176]**

On June 1, 2007, the Rincon Band of Luiseno Indians ("Plaintiff" or "Rincon") and the State of California ("Defendant" or "State") filed cross motions for summary judgment. [Doc Nos. 173-183 and Doc. Nos. 186 and 187.] The parties each seek summary judgment with respect to breach of contract claims, both substantive and procedural, asserted in Plaintiffs First Amended Complaint.[1] [Doc. No. 108.] Oral

[1] The Federal District Court previously certified for interlocutory appeal the dismissal of two claims reasserted by Plaintiff in its First Amended Complaint solely for the purpose

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argument was held on August 13, 2007. [Minute Entry No. 184 on Docket.] On September 13, 2007, Rincon requested and received authorization to file supplemental briefing in support of its cross motion for summary judgment, and said supplemental briefing was filed on September 19, 2007. [Doc. No. 186.] The State filed its reply to the supplemental brief on October 4, 2007. Doc. No. 187.] On February 22, 2008, the Court held a telephonic conference to request additional briefing from both parties regarding the impact, if any, of Propositions 94, 95, 96 and 97 on the issues presented in the parties' cross-motions for summary judgment. [Doc. No. 189.] The parties submitted briefing on the issue in accordance with

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of "preserv[ing] these claims pending resolution at the Ninth Circuit Court of Appeals." [Doc. No. 108 at 4:3-12.] Accordingly, the Court does not consider Plaintiff's Fourth Claim (Declaratory Judgment – Cap of Gaming Device License) and Sixth Claim (Detrimental Reliance) for relief in its determination of the motions for summary judgment. In addition, Plaintiff's Third Claim for relief (Declaratory Judgment – Reversion of Licenses) is not under consideration by the Court as Judge Whelan previously ruled in this matter on September 21, 2004, that third-party tribes are necessary and indispensable parties to claims affecting other tribal compacts who cannot be joined due to sovereign immunity [Doc No. 36 at 13:8.] The Court's prior Order is final and the law of the case "govern[ing] the same issue in subsequent stages of the same case." *Christianson v. Colt. Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

the Court's request on March 7, 2008 and March 14, 2008.[2] [Doc. Nos. 190-195.]

For the reasons set forth below, Plaintiff's motion for summary judgment is granted in part and Defendant's motion for summary judgment is granted in part.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. Indian Gaming Regulatory Act: Class III Tribal-State Gaming Compacts

In 1988, Congress enacted the Indian Gaming Regulation Act ("IGRA" or the "Act"), which sets forth a statutory basis for Indian tribes to offer gaming as a way to encourage tribal economic development, tribal self-sufficiency, and strong tribal government. 25 U.S.C. § 2701(4). IGRA also grants states a role in the regulation of Indian gaming. *Artichoke Joe's v. Norton,* 353 F.3d 712, 715 (9th Cir. 2003). ("IGRA is an example of cooperative federalism in that it seeks

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[2] After reviewing the supplemental briefing regarding Propositions 94, 95, 96 and 97 (the "Propositions"), the Court will not consider the outcome of the popular vote on the Propositions in the instant ruling. The Court finds that the Propositions are not a part of the administrative record and are irrelevant to the good faith determination to be made by the Court. Because of the Propositions' irrelevance to the determination of good faith, the Court further finds no need to expand the administrative record to include information concerning the Propositions.

to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.") (quoting *Artichoke Joe's v. Norton,* 216 F.Supp. 2d 1084, 1092 (E.D. Cal. 2002).

IGRA creates three classes of gaming. 25 U.S.C. § 2703(6)-(8). Class III gaming, at issue in the instant action, is the most heavily regulated. Under the Act, Class III gaming is lawful on Indian lands only if three conditions are met: (1) authorization by an ordinance or resolution of the governing body of the Indian tribe and the Chair of the National Indian Gaming Commission; (2) location in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) the existence of a Tribal-State compact approved by the Secretary of the Interior. *Id.* at § 2710(d)(1).

IGRA's Tribal-State compact requirement allows states to negotiate with tribes within the state on issues presented by Class III gaming that affect state interests. *Id.* at § 2710(d)(3)© [sic]). IGRA also requires states to negotiate in good faith. *Id.* at § 2710(d)(3)(A). Tribes are allowed under the statute to enforce the state's obligation in federal court. *Id.* at § 2710(d)(7)(A)(I) and (B)(I).[3]

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[3] The state of California has consented to such suits by waiving sovereign immunity expressly under California Government Code § 98005 ("[T]he state of California hereby . . . submits to the jurisdiction of the court of the United States in

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Under IGRA, the court, in determining whether a State has negotiated in good faith:

> – *may* take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
>
> – *shall* consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

Id. at § 2710(d)(7)(B)(iii)(I)-(II) (italics added).

If the court finds that the state has not negotiated in good faith, the court is required to order the State and the Indian tribe to conclude a compact within a 60-day period. *Id. at* § 2710(d)(7)(B)(iii). If the State and Indian tribe fail to conclude a compact within the 60-day period, the Indian tribe and the State shall each submit to a court-appointed mediator a proposed compact that represents their last best offer for a compact. The mediator will then select the compact which best comports with the terms of IGRA, Federal law and applicable court orders. *Id.* at § 2710(d)(7)(B)(iv).

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any action brought against the state by any federally recognized Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations . . . or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment. . . .") Cal. Gov't Code § 98005.

B. Tribal-State Compact Approval Process

In September 1999, former California Governor Gray Davis entered into Tribal-State Compacts with approximately 57 federally recognized California Indian tribes – including Rincon. These materially similar Compacts allowed the Tribes, consistent with IGRA, to engage in Class III gaming. In order for the Compacts to become effective, voters had to approve Proposition 1A, a voter initiative to amend the California Constitution to address the California Supreme Court's constitutionality concerns articulated in *Hotel Employees and Restaurant Employees Int'l Union v. Davis,* 21 Cal. 4th 585 (1999).

On September 10, 1999, the California Legislature passed Proposition 1A. On March 7, 2000, California voters approved Proposition 1A, amending the California Constitution to provide:

> " . . . the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts."

Cal. Const. Art IV § 19(f); *see also* 25 U.S.C. § 2710(d)(8).

On May 5, 2000, the United States Secretary of the Interior approved the Compacts pursuant to 25 U.S.C. § 2710(d)(8)(A). The Compacts were then published in the Federal Register and took effect.[4] *See* Fed. Reg. 31189 (May 16, 2000); *See e.g. Indian Gaming Related Cases* (Coyote Valley II), 331 F.3d 1094, 1103 (9th Cir. 2003).

C. The Compact Amendment Process: Negotiations between the State and Rincon

Section 4.3.3 of Rincon's Compact with the State expressly states that either a Tribe or the State may request to renegotiate the Compact on the following issues: (1) the number of authorized gaming devices; (2) revenue sharing with non-gaming tribes; (3) the revenue sharing trust fund; and (4) the allocation of gaming device licenses. [Admin. Record, Exh. 42.]

On February 28, 2003, the Davis Administration sent a letter to Rincon and all the Tribes who were a party to the Tribal-State Class III gaming contracts in order to request negotiations to amend Section 10.8 of the Compact. Specifically, Section 10.8[5] of the

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[4] An additional five compacts, also identical to the Proposition 1A Compacts, were executed before the Governor's submission of the Compacts to the Department of Interior for federal approval. *See* Federal Register March 16, 2000, July 6, 2000 and October 14, 2000.

[5] Section 10.8.3 of the Rincon Compact provides: "(a) The Tribe and the State shall, from time to time, meet to review the adequacy of this Section 10.8, the Tribe's ordinance adopted

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Compacts provides a mechanism for the State and the Tribes to periodically address the adverse effects of off-reservation environmental impacts. [Admin. Record, Exhs. 42 and 44.]

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pursuant thereto, and the Tribe's compliance with its obligations under Section 10.8.2, to ensure that significant adverse impacts to the off-Reservation environment resulting from projects undertaken by the Tribe may be avoided or mitigated. (b) At any time after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that, as it presently reads, the Section has proven to be inadequate to protect the off-Reservation environment from significant adverse impacts resulting from Projects undertaken by the Tribe or to ensure adequate mitigation by the Tribe of significant adverse off-Reservation environmental impacts and, upon such a request, the Tribe will enter into such negotiations in good faith © [sic]) On or after January 1, 2004 the Tribe may bring an action in federal court under 25 U.S.C. Sec. 2710(d)(7)(A)(I) on the ground that the State has failed to negotiate in good faith, provided that the Tribe's good faith in the negotiations shall also be in issue. In any such action, the court may consider whether the State's invocation of its rights under subdivision (b) of this Section 10.8.3 was in good faith If the State has requested negotiations pursuant to subdivision (b) but, as of January 1, 2005, there is neither an agreement nor an order against the State under 25 U.S.C. Sec. 2710(d)(7)(B)(iii), then, on that date, the Tribe shall immediately cease construction and other activities on all projects then in progress that have the potential to cause adverse off-Reservations impacts, unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State."

Section 4.3.3[6] of Rincon's Compact provides the state and the Tribe with a mechanism for renegotiating the Compact on the issues of the authorized number of gaming devices and revenue sharing. [Admin. Record, Exh. 42.] A request for negotiation under Section 4.3.3 had to be made between March 7, 2003 and March 31, 2003. *Id.* On March 8, 2003, Rincon made a formal request to the Davis administration under Section 4.3.3 to negotiate provisions concerning the authorized number of gaming devices, revenue sharing and the allocation of licenses for additional gaming devices. [Admin. Record, Exh. 43.] On March 28, 2003, the Davis Administration also formally requested renegotiation of its Compact with Rincon over a variety of issues, including revenue sharing with the State and the authorized number of gaming devices. [Admin. Record, Exh. 45.]

In October 2003, the California electorate recalled Governor Gray Davis and elected Arnold Schwarzenegger as Governor. Due to the change in administrations, the Davis Administration withdrew its request for renegotiation of Section 10.8 on November 14, 2003. [Admin. Record, Exh. 1.]

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[6] Section 4.3.3 of the Rincon Compact provides: "If requested to do so by either party after March 7, 2003, but not later than March 31, 2003, the parties will promptly commence negotiations in good faith with the Tribe concerning any matters encompassed by Section 4.3.1 and Section 4.3.2, and their subsections."

On November 21, 2003, Rincon and nine other tribes wrote to the Schwarzenegger Administration to express an interest in continuing the Compact renegotiations previously undertaken with the Davis Administration. [Admin. Record, Exh. 2.] On December 16, 2003, the State of California wrote to Rincon and the nine additional tribes to acknowledge receipt of the November 21, 2003, letter. *Id.*

On January 7, 2004, the Governor appointed Daniel M. Kolkey as the State's compact negotiator. [Admin Record, Exh. 9.] Shortly after his appointment, Mr. Kolkey commenced negotiations on behalf of the State with a group of five tribes (the "Five Tribes"), *not including* Rincon. The Five Tribes contacted Mr. Kolkey directly and sought amendments to their Compacts. *Id.*

On February 26, 2004, Rincon sent a meet-and-confer letter to the State in accordance with Section 9.1[7] of the Compact to address the timing of

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[7] Section 9.1 of the Rincon Compact provides in pertinent part: "Voluntary Resolution; Reference to Other Means of Resolution. In recognition of the government-to-government relationship of the Tribe and the State, the parties shall make their best efforts to resolve dispute that occur under this Gaming Compact by good faith negotiations whenever possible. Therefore, without prejudice to the right of either party to seek injunctive relief against the other when circumstances are deemed to require immediate relief, the parties hereby establish a threshold requirement that disputes between the Tribe and the State first be subjected to a process of meeting and conferring in good faith in order to foster a spirit of cooperation and efficiency in the administration and monitoring of performance

(Continued on following page)

negotiations, Section 10 of the Compact, licensing pool issues and the potential for off-track betting on Rincon's land. [Admin. Record, Exh. 3.]

On April 7, 2004, Rincon attended a negotiation session between the State's negotiator, Mr. Kolkey, and a coalition of various tribes. [Admin. Record, Exh. 9.] However, the April 7, 2004 session was limited to the issue of non-economic modifications to the compacts. *Id.* On April 21, 2004, Rincon requested separate compact negotiations with the State's negotiator. *Id.*

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and compliance by each other with the terms, provisions, and conditions of this Gaming Compact as follows: (a) Either party shall give the other, as soon as possible after the event giving rise to the concern, a written notice setting forth, with specificity, the issues to be resolved. (b) The parties shall meet and confer in a good faith attempt to resolve the dispute through negotiation not later than 10 days after receipt of the notice, unless both parties agree in writing to an extension of time. c) If the dispute is not resolved to the satisfaction of the parties within 30 calendar days after the first meeting, then either party may seek to have the dispute resolved by an arbitrator in accordance with this section, but neither party shall be required to agree to submit to arbitration. (d) Disagreements that are not otherwise resolved by arbitration or other mutually acceptable means as provided in Section 9.3 may be resolved in the United States District Court where the Tribe's Gaming Facility is located, or is to be located, and the Ninth Circuit Court of Appeals, (or, if those federal courts lack jurisdiction, in any state court of competent jurisdiction and its related courts of appeal). The disputes to be submitted to court action include, but are not limited to, claims of breach or violation of this Compact, or failure to negotiate in good faith as required by the terms of this Compact. . . ."

On or about May 12, 2004, the State replied telephonically to Rincon's February 26, 2004 request to meet-and-confer and proposed an available date of June 2, 2004 on which to meet. [Admin. Record, Exh. 4.] On June 2, 2004, Rincon participated in a meet-and-confer session pursuant to Section 9.1 of its Compact with the State's Chief Deputy of Legal Affairs Secretary, Paul Dobson. [Admin Record, Exhs. 7 and 48.] During the session, Rincon discussed its concerns with regard to: (1) the State's alleged failure to comply with Compact Section 4.3.3; (2) the impact of the Davis Administration's withdrawal of the request to renegotiate Compact Section 10.8; (3) the number of gaming device licenses available under the 1999 Compacts; (4) administration of the licensing pool and (5) off-track wagering.[8] [Admin. Record, Exh. 7.]

On June 4, 2004, Mr. Kolkey held a compact negotiation session with Rincon. [Admin. Record, Exh. 9.] A date of July 1, 2004 or July 2, 2004 was proposed for Rincon to attend a further compact negotiation session; however, the meeting ultimately did not go forward. *Id.*, *see also* Admin. Record, Exh.8.] On June 9, 2004, Rincon filed its original complaint in federal court. [Doc. No. 1.]

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[8] Rincon is no longer asserting a claim based on an alleged failure of the State to negotiate a codicil to the Compact regarding off-track betting [Doc. No. 108, 4:13-14.]

In a letter dated June 16, 2004 in response to Rincon's concerns about the withdrawal of the Davis Administration's renegotiation request under Compact Section 10.8, the State confirmed that "[it] will not require the Band to cease construction and other activities on projects in progress pursuant to Compact Section 10.8.3© [sic]), on the ground that no agreement amending Section 10.8 has been concluded by the Band by January 1, 2005 as provided by that section." [Admin Record, Exh. 7.]

On November 4, 2005, the parties attended a settlement meeting in San Francisco. [Admin. Record, Exh. 16.] At that meeting, the State made an offer to Rincon to enter into an amendment to the existing Compact. The November 4, 2005 offer modified terms discussed at Rincon's first compact negotiation session with Mr. Kolkey on June 4, 2004. The new offer was as follows:

> "1. The State would agree to allow the Tribe to operate an additional 900 Gaming Devices outside of the licensing pool established in the Tribe's existing compact as long as the total number of Gaming Devices in operation by the Tribe do not exceed 2500 Gaming Devices;
>
> 2. The Tribe would be required to maintain its existing Gaming Device licenses, but the parties would negotiate over the amount of the contributions made by the Tribe to the Revenue Sharing Trust Fund in connection therewith;

3. The Tribe would pay annually to the State 15% of the average net win for each of the additional Gaming Devices outside of the licensing system that it operates pursuant to the compact amendment, provided that the average net win is calculated on the basis of all Gaming Devices operated by the Tribe;

4. The Tribe would pay to the State, for the duration of the compact term, an annual fee equal to 15% of the net win in Fiscal Year 2004 from the Gaming Devices in operation at the Tribe's casino;

5. The term of the amended compact would be the same as that of the existing compact;

6. A portion of the Tribe's payment to the State could be designated for San Diego County and CalTrans, which amount would be negotiated between the Tribe and the State. Your letter to Mr. Kolkey suggests that those payments to San Diego County and CalTrans would be pursuant to an intergovernmental agreement with each governmental entity. Although not part of our offer, we are open to negotiating such an arrangement;

7. Except as set forth in paragraphs 5 and 8, the amendment would contain the same non-economic provisions as the Pala Compact Amendment;

8. The Tribe will be afforded an exclusivity provision, the terms of which will be subject to further negotiation. Your letter suggests that the exclusivity provisions would be 'similar' to the Pala compact amendment. While we did not

> specifically offer that, we are open to negotiations on that point."

[Admin. Record, Exhs. 16, 50.]

On January 25, 2006, Rincon responded to the State's offer proposing an increase in gaming machines from 1,000 up to 2,500 with a fee of $4,350 per device. [Admin. Record. Exhs. 19, 20, 50 and 51.] In addition, Rincon proposed that such fees paid be disbursed as follows:

> "First, a portion of the fee representing the Tribe's proportional share of all actual and reasonable regulatory costs (the CGCC budget and the DGC budget) shall be deducted and disbursed to the appropriate State agency.
>
> Second, the remaining fees shall be deposited into an escrow account from which disbursements may only be made pursuant to intergovernmental agreements between the Tribe and eligible local governments and State agencies.
>
> Disbursements can only be made for purposes directly related to mitigation or infrastructure development.
>
> Intergovernmental agreements shall also allow for payment for tribally provided services directly related to additional mitigation, infrastructure development and problem gambling related services."

[Admin. Record, Exh. 19.]

To the extent devices exceeded 2,500, Rincon similarly proposed a $4,350 fee per device with an ability on behalf of the State to renegotiate for a higher rate if such fees were inadequate to cover costs directly related to Rincon Tribal gaming. Rincon also proposed "[c]larifying amendments to Section 4 consistent with CGCC interpretations regarding licenses for devices 351 through 1600." *Id.*

On January 27, 2006, the State informed Rincon by detailed letter that it could not accept its January 25, 2006 proposal. [Admin. Record, Exh. 20.] On May 5, 2006, Rincon submitted a revised offer to the State in response to the State's January 27, 2006 letter. [Admin. Record, Exh. 21.] In the letter, Rincon identified the differences between the May 5, 2006 offer and the previous January 25, 2006 offer, writing: "The major changes in the offer from the offer on January 25, 2006 are:

> – The request for machine 1,601 to 2,500 @ $4,350 per device has been replaced with two tiers: (1) machines 1,601 to 2,000 @ $4,350 per device per year; and (2) machines 2,001 to 2,500 @ 6,000 per device per year . . . .
>
> – The provision that allows for the funds to be used to pay for or reimburse the Tribe for Tribally funded improvements and programs has been removed.

[Admin. Record, Exh. 21.]

On July 28, 2006, Rincon provided a further letter to the State setting forth additional topics for

discussion and resolution between the parties which included the following issues: (1) dispute resolution, (2) local government mitigation of off reservation impacts, (3) tort liability, (4) patron disputes, (5) health and safety, building codes and inspection, (6) financing flexibility, (7) labor, (8) term of the compact, and (9) gaming device testing. [Admin. Record, Exh. 22.]

On September 12, 2006, Rincon attended a compact negotiation session with the State. [Admin. Record, Exh. 29.] Rincon and the State met again on October 5, 2006. [Admin. Record, Exh. 31.] On October 23, 2006, the State extended a revised offer to Rincon by letter indicating that "[t]he terms of this proposal are similar to those accepted by the Pauma and Pala Bands (tribes, like Rincon, that face similar competitive constraints given their location and proximity to the Pechanga band's casino complex). . . .": [Admin. Record, Exh.35.]

> "A. The State would agree to allow the Band to operate an additional 900 Gaming Devices outside of the licensing pool established in the Band's existing compact as long as the total number of Gaming Devices in operation by the Band does not exceed 2,500 Gaming Devices.
>
> B. The Band would be required to maintain its existing Gaming Device licenses, but the parties would negotiate over the amount of the contributions made by the Band to the RSTF in connection therewith.

C. The Band would pay annually to the State 15% of the average net win for each of the additional Gaming Devices outside of the licensing system that it operates pursuant to the compact amendment, i.e., flat percentage, sliding scale based on the net win for certain numbers of devices, sliding scale based on levels of net win, etc. provided that the average net win is calculated on the basis of all Gaming Devices operated by the Band.

D. The Band would pay to the State, for the duration of the compact term, an annual payment equal to approximately 10% of the net win in calendar year 2005 from the Gaming Devices in operation at the Band's casino.

E. The term of the amended compact would be extended to December 31, 2025.

F. The State would consider deducting from the Band's payment to the State a portion of such funds designated for San Diego County and/or the California Department of Transportation for mitigation of off-reservation impacts, which amount would be negotiated between the Band and the State.

G. Except as set forth in paragraphs E and H, the amendment would contain non-economic provisions similar to those in the Pala Compact Amendment, with the understanding that the final terms of each provision shall be subject to negotiation by the Band and the State.

H. The Band would be afforded an exclusivity provision, the terms of which would be subject to further negotiation."

[Admin. Record, Exh.35.]

On October 31, 2006, the State submitted an alternative proposal to Rincon in response to an email inquiry made by Rincon on October 26, 2006. [Admin. Record, Exhs. 36 and 37.] The State offered: "[w]ith no extension of the term of the existing Compact and in consideration of the authorization to operate 400 additional Gaming Devices the Band is not authorized to operate under its existing Compact in order to assure the financial health of the RSTF, the Band would make a flat annual payment to the RSTF of $2,000,000 to maintain its existing 1,250 Gaming Device licenses. In addition, the Band would make an annual revenue sharing payment to the State of 25% of the net win on those 400 additional Gaming Devices." [Admin. Record, Exh. 37.] On November 3, 2006, Rincon informed the State by detailed letter that it could not accept its October 31, 2006 proposal. [Admin. Record, Exh. 38.]

II.

STANDARD: MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate under Rule 56 (c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as matter of law. *See* Fed. R. Civ.

P. 56 (c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Freeman v. Apaio,* 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.)

"The district court may limit its review to the document submitted for the purpose of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.,* 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the court is not obligated "to scour the record in search of a genuine issue of triable fact." *Keenan v.*

Allen, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Inc. Co.*, 55 F.3d 247, 251 (7th Cir. 1995). If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

If the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson*, 477 U.S. at 252) ("The mere existence of a scintilla of evidence in support of the nonmonving party's position is not sufficient.") Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56 (e)).

When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling

on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

III.

DISCUSSION

A. Good Faith In Compact Amendment Negotiations – Procedural Issues

1. Delay In Responding To Rincon's Request To Meet-And-Confer

Rincon contends that, although it contacted the State to express an interest in negotiations in accordance with the procedure set forth in its Compact, the State was dilatory and cavalier in responding to Rincon even though the State initially acknowledged receipt of Rincon's request and indicated that a representative of the State would "contact you shortly to schedule a meeting." [Rincon Motion, 38-41; Rincon Opposition, 24:4-10; Admin. Record, Exh. 2.] During the period of delay, which lasted approximately three to four months, Rincon contends the landscape of gaming in California changed based on expansive compact amendments negotiated early on between the State and tribes with locations and markets unlike that of Rincon. (Rincon Motion, 38:15-21.)

2. Delay In Contacting The State And Responding To The State's Requests For Information

The State argues that Rincon is responsible for the delays in the negotiation process by failing to contact the State's newly appointed compact negotiator, failing to submit timely proposals and other information needed to hold a productive negotiation session and taking various three-month intervals in which to respond to the State's multiple offers. (State's Motion 16:16-17:25.)

3. No Procedural Breach Of The Duty To Negotiate In Good Faith

From a careful review of the total history of negotiations as documented by the joint administrative record, the Court does not find a procedural violation of the duty to negotiate in good faith. The record demonstrates that both parties were, at times, less than prompt in responding to each other as well as in providing background material to assist in the negotiations. Justifiable delays were caused in November and December of 2003 (a time when Rincon first made its request for negotiations to the Schwarzenegger Administration) due to the transition from the Davis Administration to the new regime. Moreover, Rincon's November 2003 request to negotiate, made under Section 4.3.3 of the Compacts, does not set forth a concrete time period in which the parties must begin negotiations. Thus, although the Schwarzenegger Administration indicated in its

December 16, 2003 letter that it would "shortly" schedule a negotiation meeting with Rincon and the other tribes who co-signed the November 21, 2003 request to negotiate, the Schwarzenegger Administration was under no specific deadline to respond. [Admin. Record, Exh. 2.]

With respect to Rincon's February 26, 2004 meet-and-confer letter to the State under Section 9.1 of the Compact, the State was required to respond to Rincon within 10 days, but apparently failed to do so until May 12, 2004. [Admin. Record, Exhs. 3-4.] From the joint administrative record, it appears the long delay resulted from the parties' mutual attempts to compile documents for the requested meet-and-confer session (Rincon's Motion, 7:5-9, State's Motion 6:7-14, Admin. Record, Exh. 47.) It is clear, however, that despite the delay, the parties did finally meet-and-confer on June 2, 2004. [Admin. Record, Exhs. 5-6.] Because the parties were able to meet and confer in June 2004, as well as meet with the state negotiator in the months and years thereafter, the Court does not find procedural bad faith on the part of the State.

Furthermore, there is no evidence to suggest that, even if the parties had met within 10 days of the February 26, 2004 request to meet and confer, their disagreements over the substantive issues that are the crux of the parties' present impasse would have been resolved. Indeed, because the heart of this litigation lies in the parties' failure to achieve agreement about substantive issues, the Court declines to find procedural bad faith based on the State's initial

delay in responding to Rincon's meet-and-confer request under Section 9.1 of the Compact, especially when it appears from the Joint Administrative Record that the parties were communicating by telephone regarding the request and preparing materials necessary for the meet-and-confer session. [Admin. Record, Exh. 47.] *See e.g. Indian Gaming Related Cases* (*Coyote Valley II*), 331 F.3d 1094,1109-1110 (9th Cir. 2003) (declining to find procedural bad faith as a result of dilatory tactics where the substance of plaintiff's bad faith allegation lay in its objections to substantive compact provisions.)

B. Good Faith In Compact Amendment Negotiations – Substantive Issues

In determining whether a State has negotiated in good faith under IGRA, the Court: (1) *may* take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and (2) *shall* consider any demand by the State for direct taxation of the Indian tribe or on any Indian lands as evidence that the State has not negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(I)-(II).

1. The State's Insistence On Additional Revenue Sharing With Its General Fund

The primary argument advanced by Rincon is that the substance of the offers made by the State during compact re-negotiations amount to an attempt

to assess an illegal tax on the Tribe expressly prohibited by Section 2710 (d)(4) of the IGRA. Specifically, Rincon contends the State's insistence on revenue sharing is in bad faith because the State knowingly failed to offer meaningful concessions in exchange for an increased share of the Tribe's gaming revenue. (Rincon's Motion, 25:22-27:11.) Specifically, Rincon argues the State cannot contend it is giving the Tribe exclusivity in Class III gaming in return for revenue sharing because such exclusivity was already conferred by the State in exchange for revenue sharing through the Revenue Sharing Trust Fund and Special Distribution Fund *Id.* at 14:13-25. Rincon also argues the added exclusivity the State offered is not a meaningful concession as the Tribe, in its current compact, already has the option of terminating or renegotiating its Compact with respect to revenue sharing in the event Class III gaming is made available to non-Indian enterprises. *Id.* at 16:25-17:4. Moreover, Rincon asserts that even if the State has made a meaningful offer warranting revenue sharing, such shared revenue may not be directed to the State's general fund under the IGRA. (Rincon's Reply, 9:8-16.)

2. The State's Offers

The State argues its offers do indeed include meaningful concessions. Specifically, the State contends its ability to provide Rincon with an amendment to its current compact is a meaningful concession because without a compact Rincon is not

entitled to offer Class III gaming. (State's Motion, 26:20-27:2.) Moreover, the State contends it is not precluded from requesting revenue contributions to the State's general fund if meaningful concessions have been given. *Id.* at 27:3-11. As further evidence of its good faith and its offer of a meaningful concession, the State argues it offered Rincon enhanced remedies to protect the Tribe's exclusivity, including the benefit of being excused from specific revenue sharing requirements in the event non-Indian gaming is allowed in California. *Id.* at 28:24-29:3.

3. The State's Insistence On Revenue Sharing With Its General Fund Was In Bad Faith

In *Indian Gaming Related Cases* (*Coyote Valley II*), 331 F.3d 1094, (9th Cir. 2003), the Ninth Circuit recognized the IGRA's legislative history provides guidance for courts determining whether a party has negotiated in good faith. It noted:

> "In the [Senate] Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. State and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as

> well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens."

Id. at 1108-09.

The joint administrative record reveals that both Rincon and the State have held fast to their positions during the course of the negotiations. Despite the exchange of offers and information during the negotiation process, these two equal sovereigns have not been able to strike the right balance between the amount or type of benefits to flow between them in exchange for an amended compact.[9] *Artichoke Joe's*

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[9] This Court finds the case law involving good faith in the collective bargaining context is not instructive and only marginally helpful in that none of the cases cited by the parties involve negotiations between sovereigns. Employers and unions are not sovereigns; rather they are persons/entities within the meaning of the law who are both subject to the same sovereign, namely, the federal government. In those cases, the sovereign defines the lawful parameters of the negotiations. Each party has redress to the sovereign if the other party tries to impose an unlawful condition. The IGRA is a complicated statutory scheme which recognizes that states and tribes are equally sovereign. Accordingly, one sovereign cannot impose a tax on another sovereign. 25 U.S.C. § 2710(d)(4). Even if similarly situated sovereigns

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California Grand Casino v. Norton, 353 F.3d 712, 735 (9th Cir. 2003) ("Congress created the mechanism of Tribal-State compacts to resolve the conflicting interests of the tribes and the states, which it acknowledged as "two equal sovereigns.") As explained in detail below, this Court finds the State's insistence on an exchange of revenue *earmarked for the State's general fund* in return for an amended compact with Rincon was in bad faith.

a.) IGRA's Prohibition on Taxation, Directly or Indirectly

Section 2710 (d)(4) of the IGRA states in pertinent part: "Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." *Id.* at § 2710(d)(4). The imposition of a tax by the State upon an Indian tribe engaged in gaming is a factor the Court may

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accept the tax, the tax is not permitted under the IGRA for any tribe which objects to it. *See e.g. Idaho v. Shoshone-Bannock Tribes,* 465 F.3d 1095, 1102 (9th Cir. 2006) ("The fact that other tribes have accepted a package of benefits and burdens when they voluntarily amended their compacts does not change the terms of the Compact between the Tribes and Idaho [which retained the prohibition against taxes].")

take into consideration when conducting its good faith inquiry. As the Ninth Circuit explained in *Indian Gaming Related Cases* (*Coyote Valley II*), 331 F.3d 1094, "[d]epending on the nature of both the fees demanded and the concessions offered in return, such demands might, of course, amount to an attempt to impose a fee, and therefore amount to bad faith on the part of a State. If, however, offered concessions by a State are real, § 2710(d)(4) does not categorically prohibit fee demands. Instead, courts should consider the totality of that State's actions when engaging in the fact-specific good-faith inquiry IGRA generally requires." *Id.* at 1112 (citing 25 U.S.C. § 2710(d)(7)(B)(iii)).

b.) A Meaningful Concession To Rincon Is Required In Return For An Amendment To The Current Compact Authorizing Revenue Sharing Directly With The State

A significant stumbling block for the parties has been each side's divergent interpretations of the effects of the exclusivity provision in the California Constitution which allows Class III gaming to be conducted by Indian Tribes on Indian lands. Rincon argues that the State cannot offer exclusivity as a meaningful concession for the grant of an amendment to the existing Compact because a monopoly over Class III gaming was already conveyed in exchange for the current Compact. (Rincon's Motion, 14:12-25.) In response, the State contends the constitutional

exemption from California's prohibition on Class III gaming is not self-executing, but depends on the existence of a signed compact with the Governor and ratification by the legislature. Based on the fact that a compact is required before gaming may be conducted, the State argues that a meaningful concession is conveyed whenever the State offers a federally-recognized tribe the ability to provide additional games and machines for an extended period of time free from non-Indian competition. (State's Motion, 26:7-27:11.)

Section 19(f) of the California Constitution states in pertinent part, " . . . the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts." Cal. Const. Art. IV § 19(f). The plain language of the California Constitution makes clear that authorization is given to the governor of the state to negotiate and conclude tribal gaming compacts, and that tribal gaming may only be conducted *subject to* a compact. As the Court explained in *Artichoke Joe's v. Norton,* 216 F.Supp. 2d 1084, 1093 (E.D. Ca. 2002), "[t]he Tribal-State **compact is the key** to class III gaming under IGRA. Under such a compact, the federal

government cedes its primary regulatory oversight role over class III Indian gaming, and permits states and Indian tribes to develop joint regulatory schemes through the compacting process. In this way, the state may gain the civil regulatory authority that it otherwise lacks, and a tribe gains the ability to offer class III gaming." *Artichoke Joe's v. Norton,* 216 F.Supp. 2d 1084, 1093 (E.D. Ca.. 2002) (emphasis added.).

Here, Rincon and the State already have an existing Compact that both Rincon and the State want to amend. Rincon seeks additional gaming machines and an extension of its Compact term by 25 years to year 2045, while the State seeks substantial revenue sharing directly from the Tribe to the State's general fund. The existing Compact does authorize revenue sharing. However, the shared revenue: (1) flows between gaming tribes and non-gaming tribes through the Revenue Sharing Trust Fund ("RSTF") and (2) is available for limited use by the state legislature through the Special Distribution Fund ("SDF") for gaming-related purposes including, (a) programs to address gambling addiction, (b) support for government agencies impacted by tribal gaming, © [sic]) compensation for regulatory costs associated with the administration of the compact, (d) potential shortfalls in the RSTF and (e) other gaming related purposes identified by the legislature. *See Indian Gaming Related Cases* (*Coyote Valley II*), 331 F.3d 1094, 1106 (9th Cir.2003). All these purposes clearly comply with the IGRA and promote its objectives. Thus, the existing Compact does *not* authorize a revenue stream

from gaming tribes directly to the State's general fund for the State's use unrelated to: (1) compensating the State for regulatory costs associated with Indian gaming, (2) mitigating adverse social impacts of gaming or (3) economically benefitting non-gaming tribes.

In order to come to terms with the two revenue sharing provisions in the current Compact, the State had to provide meaningful concessions to avoid the IGRA's prohibition on direct taxation. Specifically, the Ninth Circuit found that "[i]n return for its insistence on the RSTF provision" during the initial negotiations for the current Compact, the State of California made two meaningful and real concessions: (1) the "amend[ment] [of] its constitution to grant a monopoly to tribal gaming establishments" and (2) the "offer [to] tribes [of] the right to operate Las Vegas-style slot machines and house-banked blackjack." *Indian Gaming Related Cases* (*Coyote Valley II*), 331 F.3d 1094, 1112. (9th Cir.2003) (explaining that "[a]s part of its negotiations with the tribes, the State offered to do both things.") Similarly, the Ninth Circuit found that the State's insistence on the inclusion of the SDF during negotiations for the current Compact was also in exchange for "an exclusive right to conduct class III gaming in the most populous State in the country." *Id.* at 1115. It is therefore clear that in exchange for revenue contributions to the RSTF and the SDF, which are provided for in the current Compact, the State has already given a monopoly to tribal gaming establishments, including Rincon. In light of the

Ninth Circuit's analysis, this Court finds the consideration that was already given (exclusivity) for the mutual compact cannot be repeatedly reused as a basis for the State's desire for a new compact where the proposed terms of the new compact include an improper taxation to which the other sovereign (Rincon) objects. In this Court's view, the State has not offered exclusivity because exclusivity already exists. As discussed in detail below, the State has simply offered more devices and time in exchange for its revenue sharing request.

In order to amend the existing Compact to properly allow for the State's new revenue sharing proposal, the State must provide other meaningful concessions to Rincon. The need for *other meaningful concessions* is not only required under basic contract law principles[10] governing modification, but required under the Ninth Circuit's interpretation of Section 2710(d). In short, the Ninth Circuit requires a meaningful concession in return for fee demands. *Indian Gaming Related Cases* (*Coyote Valley II*), 331 F.3d 1094, 1112. (9th Cir.2003) ("We do not hold that the State could have, without offering anything in return,

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[10] *See New York v. Oneida Indian Nation of New York*, 78 F. Supp.2d 49, 60-61 (N.D.N.Y. 1999) ("The Supreme Court has stated that a compact is akin to a contract. Thus, in interpreting the Compact, the Court is guided by ordinary principles of contract interpretation"); *See* 17A Am. Jur. 2d Contracts § 507 ("A valid modification of a contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration.")

taken the position that it would conclude a Tribal-State compact with Coyote Valley only if the tribe agreed to pay into the RSTF. Where, as here, however, a State offers meaningful concessions in return for fee demands, it does not exercise authority to impose anything. Instead, it exercises its authority to negotiate, which the IGRA clearly permits."); *see also Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006) ("It is also true that, despite this statutory prohibition [Section 2710(d) in the IGRA], States and tribes have negotiated compacts that provided for payments by the tribes to the states. (citation omitted.) The theory on which such payments were allowed, however, was that the parties *negotiated* a bargain permitting such payments in return for meaningful concessions from the state (such as a conferred monopoly or other benefits). Although the state did not have *authority* to exact such payments, it could bargain to receive them in exchange for a quid pro quo conferred in the compact.") (Emphasis in original.) Building on that analysis, it is clear that the failure to offer meaningful concessions causes a State to exceed its authority to negotiate and is, in fact, an attempt to impose a tax.

Although the State now argues in opposition to Rincon's motion that it could offer, for a second time, the exclusivity (already given in exchange for the RSTF and SDF) toward a *new* revenue sharing provision, it appears from the State's offers that the State was aware the monopoly it originally conferred could not again be considered a new and meaningful

concession because the State offered Rincon a negotiable "exclusivity provision" in exchange for direct revenue sharing. [Admin. Record, Exhs. 16 and 35.] The additional exclusivity provision offered by the State did not have specific terms. However, the State explains in its motion that in general, the offered provision "provide[s] that if a non-Indian Individual or entity is allowed to operate class III gaming within a specified market area, the adversely affected tribe would be excused from specific revenue sharing requirements in the amended Compact." (State Opposition at 15, fn. 6.) The Court notes that the citizens of California would have to amend the State Constitution in order to allow non-Indian gaming.[11]

In conjunction with the modified exclusivity provision, the State offered Rincon: (1) the ability to provide more machines over and above the limit set in connection with the original Compact in furtherance of the State's public policy in favor of containing casino style gambling, and (2) a five-year extension of its current Compact term. [Admin. Record, Exhs. 16 and 35.] Other than the Ninth Circuit's pronouncement in *Idaho v. Shoshone-Bannock Tribes*, which

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[11] In order for non-Indian tribes to operate gaming devices in California, a new state Constitutional Amendment would have to pass requiring one of three of the following events: (1) a legislative proposal supported by a supermajority vote of the Legislature and a majority vote of the citizenry, (2) a constitutional convention, or (3) an initiative petition signed by eight percent of the voters and then a majority vote of the citizens of California. Cal. Const. Art. II § 8(b), art. 18 §§ 1, 2, 3, 4.

found the grant of a "monopoly or other benefits" to be a meaningful concession, there is little authority available on the issue of what constitutes a meaningful concession. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006). Thus, this Court is left to first decide whether the State's new offers of modified exclusivity, additional machines and a 5-year term extension constitute meaningful concessions. The State has made some concessions in that there is some benefit in the State's willingness to: (1) "lock in" reduced revenue sharing fees in advance of any future event that would erode the exclusivity presently enjoyed by gaming tribes; (2) expand the outlines of the State's long-standing public policy against casino-style gambling, and (3) provide Rincon with a longer Compact term, which gives the Tribe more time to operate its gaming facilities. However, the issue is whether, under the totality of the circumstances, the fees demanded in light of the concessions offered amount to the imposition of a fee. *Indian Gaming Related Cases* (*Coyote Valley II*), 331 F.3d 1094, 1112 ("Depending on *the nature of both the fees demanded and the concessions offered in return*, such demands might, of course, amount to an attempt to impose a fee, and therefore amount to bad faith on the part of a State.") (italics added.) When the amount and type of fees demanded by the State are added to the equation, this Court finds the fees constitute an attempt to impose a tax in violation of Section 2710 (d)(4) of the IGRA.

Specifically, on October 23, 2006, the Stated [sic] asked for an annual flat fee based on ten percent of gross gaming revenue on all gaming devices for fiscal year 2005 and an additional amount equal to 15 percent of the average net win for each gaming device over 1,600 machines. [Admin. Record, Exh. 35.] Under the analysis conducted by the State's own expert, Professor William Eadington, the State's October 23, 2006 offer allowing Rincon an additional 900 machines would provide the State with an unrestricted fee for use in its general fund of *$37.9 million dollars* while Rincon would make only *$1,716,000* from adding 900 machines to its current 1,600 machine operation. [Admin. Record., Exh. 37 at p. 5 of Exhibit B; State's Motion at 21:813; Rincon's Motion, 27:1-6.] This substantial fee, 37 times greater than what Rincon receives, is unreasonable compared to the balance struck in the first compact negotiation between the tribes and the State where an actual monopoly was conferred in exchange for millions of dollars of fees to be funneled to gaming-related impacts covered by the RSTF and SDF.[12] In the parties' newest negotiations for an amendment to the current Compact, the State demands 10 to 15 percent of revenue from Rincon's existing gaming devices as well as from the 900 new devices sought. In exchange

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[12] Rincon currently pays a fee of $1.335 million per year into the RSTF. [Joint Admin. Record, Exh. 21 at p. 7.] Rincon does not contribute to the SDF because it was not conducting Class III gaming before September 1, 1999 [Defendant's Opp'n, p. 16, fn. 7.]

for this estimated revenue stream of $37.9 million dollars, Rincon would not receive a monopoly, but an agreement to reduce its fee payment in the future should gaming one day be opened up to non-tribal gaming establishments (a scenario the Court finds speculative and unlikely given the State's established public policy against casino-style gaming), 900 more machines and five additional years to operate under its Compact. [Admin. Record, Exh. 35.]

In holding that the Special Distribution Fund did not violate the IGRA's prohibition against taxation of tribes or tribal lands, the Ninth Circuit found that limited revenue sharing for specific purposes related to tribal gaming was a reasonable exchange for the exclusivity granted to tribes. *Indian Gaming Related Cases* (*Coyote Valley II*), 331 F.3d 1094, 1115. ("We do not find it inimical to the purpose or design of IGRA for the State, under these circumstances, to ask for a reasonable share of tribal gaming revenues for the specific purposes identified in the SDF provision.") Here, however, the State has demanded Rincon pay a fee directly to the state that is unrelated to gaming and has no limitations on its use in return for a fee-reduction provision that has decidedly less value than the original exclusivity provision given to the tribes, which already provides a monopoly to tribal gaming interests. Such a fee demand falls outside the scope of 25 U.S.C. § 2710(d)(3)(C)(iii), which only allows assessments by the State in order to defray the costs

of regulating gaming activity.[13] The State has not only refused to connect the new revenue sharing provision to gaming-related interests, but provides no evidence to show that it needs the proposed additional revenues needed to regulate gaming activity or mitigate adverse impacts therefrom. Instead, the State argues additional revenue sharing is warranted to balance the economic interests between the Sate and the Tribe because the State is foregoing revenue it could have obtained from non-Indian gaming operators, if such non-Indian operators were allowed to game in California. (State's Opp'n at 10:19-11:5.) Furthermore, the State's rationale for requiring such a large revenue sharing fee is another indication to this Court that the State's fee demands constitute an improper attempt to impose a tax on Rincon in lieu of being able to levy a tax on non-existent non-Indian gaming operators. It is difficult to regard the State's proposed plan as anything more than a tax when it functions as a tax.[14]

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[13] Section 2710(d)(3)(C)(iii) of the IGRA provides that any Tribal-State compact negotiated under Section 2710(d)(3)(A) may include provisions relating to: "the assessment by the State of such activities in such amounts in such amounts [sic] as are necessary to defray the costs of regulating such [gaming] activity."

[14] As defined by Black's Law Dictionary, a tax is a "monetary charge *imposed* by the government on persons, entities, transactions, or property to yield *public revenue*." Black's Law Dictionary 1496 (18th ed. 2005) (emphasis added).

The Court also notes that the increased fee demanded by the State will not benefit non-gaming tribes. Indeed, under the State's last offer, the parties would negotiate over the amount of the contributions made by Rincon to the RSTF, and Rincon would simply be required to maintain its current contribution of $1.335 million per year into the RSTF. [Admin. Record, Exhs.21 and 35.]

Without an acceptable nexus between the fee demanded and the IGRA-sanctioned uses to which it is put, this Court finds that the revenue sharing insisted upon by the State violates Section (d)(4), which prohibits states from taxing tribes. Accordingly, the Court finds that the State's insistence on the payment of such a large fee to its general fund in return for concessions of markedly lesser value was in bad faith in light of the prohibition against taxation set forth in the IGRA and the parameters discussed in the Ninth Circuit's *Coyote Valley II* decision, which only approved limited and reasonable revenue sharing and made no decision as to the legality of placing revenue derived from tribal gaming into a state's general fund. *See Indian Gaming Related Cases* (*Coyote Valley II*), 331 F.3d 1094, 1115, fn. 17, (9th Cir. 2003).

C. Negotiations On Non-Economic Issues Under Section 10.8 Of The Compact

1. Section 10.8 Negotiations Were Not Concluded

Rincon contends that the State has not concluded section 10.8 negotiations in good faith despite the fact that: (1) former Governor Gray Davis withdrew his administration's request to negotiate before Governor Schwarzenegger took office; and (2) the State warranted in writing that it would not enforce the cease and desist provisions of section 10.8. [Admin. Record, Exhs. 1, 7 and 8.] Rincon insists that despite the doctrine of equitable estoppel, the Davis Administration's November 14, 2003 rescission letter and the State's June 16, 2004 letter indicating that "the State will not require the Band to cease construction and other activities on projects in progress pursuant to Compact Section 10.8.3© [sic])" are insufficient to protect it, should the State choose to disregard its statements. (Rincon Motion, 41:9-42:16.) Further, Rincon argues that because the State did not offer to: (1) amend the Compact to vacate the cease and desist date, or (2) stipulate to a judgment finding a failure to negotiate Section 10.8 in good faith, the State has revealed its bad faith. (*Id.* at 42:17-23.)

2. The Request for Negotiations Under Section 10.8 Were Not Concluded Because The Request Was Rescinded

The State argues there is nothing for the Court to adjudicate with respect to Section 10.8 of the Compact because: (1) the Davis Administration rescinded its request for negotiation, and (2) the Schwarzenegger Administration has repeatedly indicated in writing that it would not prevent Rincon from completing construction already in progress as of January 1, 2005 on the basis that the parties did not conclude negotiations triggered by Section 10.8. (State Motion, 41:10-20.) Further, the State contends that the Davis Administration's rescission and the State's agreement not to enforce the cease and desist provision of Section 10.8 are not evidence of bad faith negotiation in as far as the State has continued to negotiate and set forth offers with respect to non-economic issues in its proposals of November 10, 2005, October 23, 2006 and October 31, 2006. (State's Reply Brief, 14:13-18; Admin. Record, Exhs. 16, 35 and 37.)

3. Failure to Conclude Negotiations On Non-Economic Issues Does Not Constitute Bad Faith On The Part Of The State

While the Court recognizes Rincon may be apprehensive about the future enforceability of the State's pronouncements that it will not act on the cease and desist provisions of Section 10.8, the Court finds the issue of whether estoppel would be applicable to prevent the State from invoking Section

10.8.3© [sic]) is not ripe for adjudication. As a general rule, "a federal court normally ought not resolve issues involving contingent future events that may not occur as anticipated, or indeed may not occur at all." *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) (breach of contract claim presented no live case or controversy where the claim hinged on future conduct by a party to the contract.) Here, the Davis Administration rescinded its request for renegotiation of non-economic terms and there has been no attempt by the present administration to enforce Section 10.8.3© [sic]). The effectiveness of equitable estoppel to prevent the State from seeking to enforce the cease and desist provisions of Section 10.8.3© [sic]) is too hypothetical and abstract at this time for evaluation.

The Court further finds that in light of the past administration's rescission letter, the current administration's multiple assurances that it would take no action under Section 10.8.3© [sic]) and the State's willingness to continue to negotiate over non-economic impacts without the benefit of Section 10.8.3(c)'s cease-and-desist provision does not constitute bad faith on the part of the State.

IV.

CONCLUSION AND ORDER THEREON

In light of the foregoing, the Court **DENIES in part and GRANTS in part**, the parties' cross-motions for summary judgment. **It is hereby ordered**, pursuant to the Indian Gaming Regulation

Act, 25 U.S.C. § 2710(d)(7)(B)(iii), that the State and Rincon shall conclude an amended compact within 60 days from the date of this Court's Order. If the State and Indian tribe fail to conclude a compact within the 60-day period, the Indian tribe and the State shall each submit a proposed compact to a court-appointed mediator that represents their last best offer for a compact. The mediator will then select the compact which best comports with the terms of IGRA, Federal law and applicable court orders. *Id.* at § 2710(d)(7)(B)(iv).

It is further ordered that the Court will hold a Status Conference at the conclusion of the 60-day period on ***July 1, 2008, at 2:00 p.m.*** in the chambers of the Hon. William McCurine, Jr., United States Magistrate Judge, 940 Front St., San Diego, CA 92101.

IT IS SO ORDERED.

DATED: April 29, 2008

/s/ William McCurine Jr.
Hon. William McCurine, Jr.
U.S. Magistrate Judge
United States District Court

Copy to:

ALL PARTIES AND COUNSEL OF RECORD

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, AKA Rincon San Luiseno Band of Mission Indians, AKA Rincon Band of Luiseno Indians, Plaintiff-Appellee, v. ARNOLD SCHWARZENEGGER, Governor of California and STATE OF CALIFORNIA, Defendants-Appellants.	No. 08-55809 D.C. No. 3:04-cv-01151-WMC Southern District of California, San Diego

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, AKA Rincon San Luiseno Band of Mission Indians, AKA Rincon Band of Luiseno Indians, Plaintiff-Appellee-Cross-Appellant, v. ARNOLD SCHWARZENEGGER, Governor of California; et al., Defendants-Appellants Cross-Appellees.	No. 08-55914 D.C. No. 3:04-cv-01151-WMC Southern District of California, San Diego ORDER (Filed Jun. 7, 2010)

Before: T.G. NELSON, BYBEE and M. SMITH, Circuit Judges.

Judge M. Smith has voted to deny the petition for rehearing en banc, and

Judge T.G. Nelson so recommends. Judge Bybee has voted to grant the petition.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing en banc is therefore DENIED.

United States Department of the Interior

[SEAL] OFFICE OF THE SECRETARY
Washington, DC 20240

AUG 17 2010

The Honorable Arnold Schwarzenegger
Governor of California
Sacramento, California 91903

Dear Governor Schwarzenegger:

I am writing to you regarding the proposed Class III Gaming Compact (Compact) between the State of California (State) and the Habematolel Pomo of Upper Lake (Tribe) the Department of the Interior received on July 6, 2010.

The Tribe executed the Compact on August 28, 2009. You signed the Compact on January 7, 2010, following ratification by the State Legislature. The Tribe originally submitted the Compact to the Department for review on January 12, 2010. Following a brief period of communication with the Department, during which the Department posed questions regarding the Compact's revenue sharing provisions, the Tribe and the State agreed to withdraw the Compact and submit information justifying the Compact's revenue sharing provisions.

The Tribe resubmitted the Compact to the Department on February 25, 2010. Prior to the expiration of IGRA's 45-day review period, on April 8, 2010, the Tribe and the State again agreed to withdraw the

Compact to provide the Department with more information in support of the Compact's approval.

In the intervening period between the original January 12, 2010 submission and today, my staff and I met with representatives of the Tribe on several occasions to discuss a number of issues related to the Compact. My office has also reviewed numerous documents submitted by the Tribe and the State in support of the Compact. Since the Compact currently under review is the same agreement that was initially submitted on January 12, 2010, we have included all documentation the Tribe and State have sent us since that time in the administrative record for this decision.

Under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(8)(C), the Secretary may approve or disapprove the Compact within 45 days of its submission. If the Secretary does not approve or disapprove the Compact within 45 days, IGRA states that the Compact is considered to have been approved by the Secretary, "but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C). Under IGRA the Department must determine whether the Compact violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.

DECISION

We have completed our review of the Compact, along with the additional material submitted by the Tribe and the State. For the following reasons, the Compact is hereby disapproved under Section 2710(d)(8) of IGRA.

BACKGROUND

The Compact authorizes the Tribe to operate Class III gaming on its lands in northern California, including up to 750 gaming devices (slot machines), any banking or percentage card games and any devices or games that are authorized under State law to the California State Lottery until December 31, 2030. Sections 3.0, 4.1 and 14.2(a).

The Compact contains two provisions requiring the Tribe to share gaming revenues with the State. Section 4.3.1 requires the Tribe to pay 15 percent of its net win to the State's general fund (revenue sharing) and Section 5.2(a) requires annual contributions to the Revenue Sharing Trust Fund (RSTF) of $900 for each gaming device the Tribe operates in excess of 349 devices.

In exchange for the Tribe's revenue sharing payments, Section 4.4(a) of the Compact grants the Tribe exclusivity within the Tribe's "core geographic market" – a zone within a "100-mile radius of the Tribe's Gaming Facility," (Core Geographic Area or CGA). If the State authorizes any person or entity, other than

a federally recognized tribe or the State Lottery, to engage in gaming activity authorized by the Compact, and the person or entity engages in those gaming activities within the CGA, the Tribe would be relieved of its obligation to make the 15 percent revenue sharing payments to the State.

The primary justification provided to the Department for the 15 percent revenue sharing provision in the Compact is the State's assertion that under Proposition 1A the Tribe has the exclusive right to operate Class III gaming to the exclusion of non-tribal competitors throughout the State, and in the event Proposition 1A is overturned such exclusivity would be further protected within the CGA. Other revenue-sharing justifications provided by the State and the Tribe included the Tribe's eligibility to continue to receive RSTF payments, and the ability of the Tribe to deduct participation fees from the calculation of its net win.

ANALYSIS

The Secretary may only disapprove a proposed Compact under IGRA where the Compact violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligation of the United States to Indians. 25 U.S.C. § 2710(d)(8)(B).

The Department is committed to upholding IGRA, which expressly provides that it does not authorize states to levy a tax, fee, or other assessment on

Indian gaming except to defray the state's costs of regulating Class III gaming activities. 25 U.S.C. § 2710(d)(8). IGRA also prohibits states from refusing to negotiate tribal-state gaming compacts based upon the lack of authority to impose such a tax, fee, or other assessment on Indian gaming. *Id.*

We review revenue sharing requirements in gaming compacts with great scrutiny. Our analysis first looks to whether the state has offered meaningful concessions. We view this concept as one where the state concedes something it was not otherwise required to negotiate such as granting exclusive rights to operate Class III gaming or other benefits sharing a gaming-related nexus. We then examine whether the value of the concessions provides substantial economic benefits to the tribe proportional to the revenue sharing required.

An important part of our analysis is that the United States Court of Appeals for the Ninth Circuit issued an opinion in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), providing guidance on the extent to which revenue sharing and variations on tribal gaming exclusivity constitute "meaningful concessions" under IGRA. In reaching its decision the Court reiterated that in order to be lawful under IGRA, a state may request revenue sharing if the revenue sharing provision is (a) for uses "directly related to the operation of gaming activities," (b) consistent with the purposes of IGRA, and (c) not "imposed" because it is bargained for in exchange for a "meaningful

concession." *Rincon*, 602 F.3d at 1033 (discussing *In re Indian Gaming Cases* (*Coyote II*), 331 F.3d 1094, 1103 (9th Cir. 2003).

A. The State's Concessions

As noted above, a "meaningful concession" exists where the state concedes something it was not otherwise required to negotiate and to which the tribe is not already entitled.

The State asserts that the Compact provisions allowing for the deduction of participation fees – those fees paid to suppliers for the right to lease gaming devices – from the calculation of net win constitutes a meaningful concession. The State also asserts that permitting the Tribe to continue to participate in the Revenue Sharing Trust Fund (RSTF) constitutes a significant and meaningful concession. Next, the State asserts that permitting the Tribe to operate up to 750 gaming devices is a meaningful concession. Lastly, the State asserts that protection of exclusive Indian gaining rights under Proposition 1A, and the additional protection of the Tribe's exclusive gaming rights within the Tribe's CGA constitute separate and independent meaningful concessions on the part of the State justifying the 15 percent revenue sharing provision. Each of these elements is analyzed below.

1. Deduction of Participation Fees

The National Indian Gaming Commission's definition of operating expenses already allows participation fees to be classified as an operating expense, outside the calculation of net revenue. Therefore, because the State has not provided anything new to which the Tribe is not already entitled, this does not constitute a meaningful concession.

2. Continued Participation in the RSTF

The State does not grant or deny tribal participation in the RSTF. Tribal eligibility is defined in other tribal-state compacts in California and under State law. The State cannot confer a substantial economic benefit upon the tribe by claiming to allow the Tribe to enjoying benefits to which it is already entitled.

Additionally, the Tribe suggested in a July 1, 2010, letter to the Office of Indian Gaming that continued participation in the RSTF will offset a portion of its revenue sharing payments.[1] Permitting the Tribe to draw from the RSTF only to transfer that amount and more back to the State through revenue sharing

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[1] "Moreover, because of the Tribe's continuing eligibility for disbursements from the Revenue Sharing Trust Fund, the Tribe will in fact receive more money from the State each year than it pays pursuant to the terms of the Compact." Letter from Sherry Treppa, Chairperson of Habematolel Pomo of Upper Lake, to Paula Hart, Director of the Office of Indian Gaming. July 1, 2010.

allows the State to use the Tribe as a conduit to appropriate Indian gaming funds contributed to the RSTF by other gaming tribes to which the State is not entitled.

3. Authority to Operate up to 750 Gaming Devices

In 1999, the State and 61 tribes entered into what became known as the "1999 Compacts," which were ratified by the State Legislature after passage of Proposition 1A, and later approved by the Department. Under the 1999 Compacts, each tribe was permitted to operate a minimum of 350 slot machines, or the number of slot machines a tribe was operating on September 1, 1999, whichever was greater. The 1999 Compacts also contained a complex system to seek additional slot machines, but this process has proved cumbersome, difficult to administer, and has resulted in multiple lawsuits against the State. We view this concession as meaningful.

4. Protection of Exclusive Gaming Rights

In 2000, the State's voters approved Proposition 1A, an amendment exempting tribal gaming from the prohibition Section 19 of Article IV of the California Constitution that exempted tribal gaming from the prohibition on Nevada-style casinos. This amendment effectively granted all California tribes a constitutionally protected monopoly on most types of Class III games in California. We recognize that the State's

grant of Class III gaming exclusivity to all California tribes, including the Habematolel Pomo of Upper Lake, is a concession.

However, we do not believe the CGA can also count as an independent or separate "meaningful concession" in light of Proposition 1A's tribal exclusivity that now constitutes the law of the State of California, notwithstanding the CGA.

B. Substantial Economic Benefit

We now examine whether the value of the concessions provide substantial economic benefits to the tribe proportional to the revenue sharing required.

The State has asserted that protection of the Tribe's exclusive gaming rights, both generally and specifically within the Tribe's CGA, confer a substantial economic benefit upon the Tribe justifying a revenue-sharing rate of 15 percent.

We have determined that only the tribal exclusivity under Proposition 1A constitutes a meaningful concession on the part of the State. Assuming *arguendo* that the CGA also constitutes a meaningful concession, these provisions do not by themselves or together, confer a substantial economic benefit upon the Tribe proportional to the value received by the State through the 15 percent revenue sharing provision.

Today there is one non-Indian gaming facility within the Tribe's CGA, the 101 Club in Petaluma, California, offering 15 poker tables. The 101 Club is the only

commercial gaming facility to have operated continuously within the CGA prior to any exclusive tribal gaming rights in California. We believe this demonstrates that the market within the CGA is not conducive to new competition from commercial gaming facilities. Construction of the Tribe's new gaming facility is unlikely to alter this dynamic.

The Tribe and State contend that State foregoing repeal of its constitutional amendment granting tribes in California exclusive authority to operate Las Vegas-style gaming confers a substantial economic benefit upon the Tribe. As support for its position, the Tribe cites efforts by groups within the State that have attempted, albeit unsuccessfully, to gather enough signatures for ballot initiatives aimed at authorizing commercial gaming. Whether such initiatives will ultimately prove successful in repealing the status quo is a difficult question, but the Ninth Circuit has recently addressed the issue, at least in part, in *Rincon*.

The Court wrote that since "passage of a constitutional amendment eliminating tribal gaming exclusivity is highly unlikely, freedom from non-tribal competition in (Rincon's) core geographic market provides no significant additional economic advantages over whatever value the Tribe receives from the statewide exclusivity it already enjoys." *Rincon*,

602 F.3d 1019, 1038 (9th Cir. 2010).[2] While we recognize that some of the facts underlying the *Rincon* decision may be distinguishable from the Tribe's circumstances, we cannot ignore the Ninth Circuit's views on this point.

Moreover, even if commercial gaming was approved by the State, the Tribe would have to continue sharing 15 percent of its net win if extensive commercial gaming started operating in California beyond the CGA. This is true regardless of any negative impact statewide commercial gaming had on the Tribe's net revenues.

In addition, the Tribe's current primary market competitors are existing tribal gaming facilities, none of which are covered by the Compact's CGA exclusivity provisions.[3] There are at least 11 tribal gaming

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[2] *Rincon* also noted that "[s]ince passage of a constitutional amendment eliminating tribal gaming exclusivity it is extremely unlikely . . . [that] the monetary remedies [in the Compact] contingent upon that event have anything more than speculative value . . . " 602 F.3d at 1038.

[3] While not determinative in this instance, the revenue-sharing provisions contained in the Class III gaming compacts for each of these tribes are illustrative of the value of tribal gaming exclusivity in the CGA. Nearly all of the tribes operating Class III gaming facilities in the Habematolel Pomo of Upper Lake's CGA are party to compacts that provide for tribal payments of 10 percent to the Special Distribution Fund (SDF) for between 501 and 1,000 electronic gaming devices. See, e.g. Class III Gaming Compact of the Middletown Rancheria Band of Pomo Indians (Oct. 12, 1999). Moreover, those same compacts provide for a tribal revenue sharing rate of 7 percent to the SDF for

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facilities within the CGA operating as few as 92 gaming devices (Cahto Laytonville Rancheria) to as many as 1,300 devices (Dry Creek Rancheria). As many as six of the tribes operating these gaming facilities have received RSTF payments, indicating that they operate 349 gaming devices or less. Most of these tribes have received payments from the RSTF since the first distributions were made in 2004 through June 30, 2010, the most recent date for which data is available.

We find that the exclusivity offered by Proposition 1A, while providing some economic benefit to the Tribe, is not so substantial as to justify a 15 percent revenue sharing provision for the size of the facility agreed upon. And, as discussed above, any value that is arguably added by the CGA is limited in economic benefit to the Tribe in comparison to a 15 percent revenue sharing provision, because the Tribe must compete with other Indian gaming enterprises within the CGA and repeal of Proposition 1A is purely speculative.

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between 201 and 500 electronic gaming devices, and for no tribal revenue sharing where the facility contains fewer than 201 electronic gaming devices. In this instance, the Compact would require the Tribe to pay 15 percent of Net Win to the State's general fund beginning with the first electronic gaming device for a similarly-sized facility.

CONCLUSION

Based on this analysis I find that the Compact is in violation of IGRA. Therefore, I hereby disapprove the Compact.

I deeply regret that this decision is necessary, and understand that it constitutes a significant economic setback for the Tribe. Nevertheless, the Department is committed to upholding IGRA and cannot approve a compact where the State imposes a tax, fee, charge, or other assessment on a tribally-owned gaming facility in violation of IGRA, as set forth above. *See* § 25 U.S.C. 2710(d)(8).

I strongly encourage the State to negotiate a new Class III gaming compact with the Tribe in good faith and in accordance with IGRA so that the Tribe may proceed with its efforts to develop its economy for the benefit of its members.

A similar letter has been sent to Tribal Chairperson Sherry Treppa, Habematolel Pomo of Upper Lake.

Sincerely,

/s/ Larry Echo Hawk
Larry Echo Hawk
Assistant Secretary –
Indian Affairs